C-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 24 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
MAY 20 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

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JS-5/JS-6	
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CEMEX, INC., a Louisiana corporation
Plaintiff,

vs.

COUNTY OF LOS ANGELES and DOES 1 through 10, inclusive
Defendant.

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

CITY OF SANTA CLARITA,
Defendant-in-Intervention

C-2

CASE NO. CV-02-747 DT (FMOx)

JUDGMENT

Judgment is hereby entered consistent with the terms of the Consent Decree filed in this matter on May 3, 2004 and entered on May 6, 2004.

DATED: May 20, 2004

DICKRAN TEVRIZIAN
HON. DICKRAN TEVRIZIAN
JUDGE OF THE UNITED
STATES DISTRICT COURT

JEFFER, MANGELS BUTLER & MARMARO LLP
KERRY SHAPIRO (Bar No. 133912)
PATRICIA S. BRODY (Bar No. 70275)
SCOTT N. CASTRO (Bar No. 191499)
Two Embarcadero Center, Fifth Floor
San Francisco, California 94111-3824
Telephone: (415) 398-8080
Facsimile: (415) 398-5584

Attorneys for Plaintiff CEMEX, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ENTERED
CLERK, U.S. DISTRICT COURT
MAY - 6 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
MAY - 3 2004
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

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Plaintiff,

vs.

COUNTY OF LOS ANGELES and
DOES 1 through 10, inclusive
Defendant.

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

CASE NO. CV-02-747 DT (FMOx)

CONSENT DECREE
(PROPOSED)

Hearing Date: March 15, 2004
Time: 10:00 a.m.
Judge: Hon. Dickran Tevrizian

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CEMEX, INC., a Louisiana corporation
Plaintiff,

vs.

COUNTY OF LOS ANGELES and
DOES 1 through 10, inclusive
Defendant.

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

CASE NO. CV-02-747 DT (FMOx)

CONSENT DECREE

TABLE OF CONTENTS

Page

I. RECITALS AND BACKGROUND 8
II. GENERAL PROVISIONS 12
A. Definitions 12
B Jurisdiction 17
C. Agents for Service of Process and Notices 18
D. Parties Bound 20
E. Successors and Assigns 22
F. Implementation of Consent Decree 22
1. Effective Date 22
2. Enforceability 22
3. Duration of Consent Decree 29
4. Complete Agreement 29
5. Incorporation by Reference 30
6. Captions 30
7. Authority 30
8. No Admission 31
9. Cooperation 32
10. Release 33
11. Modifications to the Consent Decree ... 33
12. Interpretation of Consent Decree 33
13. Severability 34
14. Waiver 36
15. Attorneys' Fees 36
16. Limitations as to the United States 36
17. Counterparts; Facsimile 36
18. Reservation of Police Power 37
G. Subsequent Actions Affecting Consent Decree 37
III. STIPULATED FACTUAL BACKGROUND 38
A. Project Overview 38
B. Federal Environmental Review of the Project . 40
C. County Environmental Review of the Project . 43
D. The Pleadings and the Parties Allegations 50

1. CEMEX's Allegations 50
2. United States Allegations 56
3. County Allegations 58
IV. FINDINGS, CONCLUSIONS, AND DETERMINATIONS 60
A. Federal Preemption 60
B. Adequacy Of Environmental Review 63
C. Public Hearing Process 68
V. PARAMETERS OF PROJECT TO BE APPROVED BY THE COUNTY 69
A. Federal Land Use and Environmental Decision-Making 69
B. CEQA Environmental Documentation and Review 71
1. The County Will Certify the November 2001 EIR Without Further Public Review or Comment 71
2. The County Will Prepare and Adopt CEQA Findings 73
3. The County Will Prepare and Adopt a Statement of Overriding Considerations 74
C. The County Will Issue All Required Entitlements For The County-Approved Project 76
1. Surface Mining Permit 77
2. Reclamation Plan 78
3. Financial Assurances 80
VI. INJUNCTIVE RELIEF 80

Plaintiff CEMEX, Inc. ("CEMEX"), Plaintiff-in-Intervention United States of America ("United States"), and Defendant County of Los Angeles ("County") have agreed to settle the litigation *CEMEX, Inc., et al. v. County of Los Angeles*, U.S.D.C. Case No. CV-02-747 DT (FMOx), in accordance with the following terms and conditions of this Consent Decree. Exhibits A through J shall be deemed to be parts of this Consent Decree and are fully incorporated by reference herein.

I. RECITALS AND BACKGROUND

On January 25, 2002, CEMEX commenced this action alleging that the County has engaged in a course of public action intended to obstruct, delay and frustrate implementation of federal law, and a series of federal decisions, regarding the mining of federal mineral resources in the County, precluding implementation of CEMEX's Soledad Canyon Sand and Gravel Mining Project ("Project"), approved by the U.S. Department of Interior, Bureau of Land Management ("BLM"), which public action was in violation of the federal Materials Act of 1947 ("Materials Act"), 30 U.S.C. §§ 601 *et seq.* and the Federal Land Policy and Management Act, of 1976 ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.* On September 10, 2002, the United States intervened as Plaintiff-in-Intervention alleging that the County has blocked the BLM's mineral materials sales to CEMEX and interfered with BLM's mineral materials sales program by continually attaching land-use restrictions and unreasonable conditions on CEMEX's use of the federally-owned mineral estate. The BLM further alleges that the County's delay and ultimate denial of a surface mining permit stands as an obstacle to the fulfillment of the congressional purposes behind the Materials Act and FLPMA.

By virtue of executing this Consent Decree, the County is not admitting liability but has determined it is in its best interest to resolve this litigation. Nevertheless, without admitting liability, the Parties consent that the Court may enter the Recitals, Findings, Conclusions, and Determinations set forth below for purposes of this Consent Decree only and any proceedings to enforce its provisions. This Consent Decree resolves all claims and defenses which were or could have been asserted in CEMEX's complaint filed in this case ("Complaint"), the United States' complaint-in-intervention filed in this case ("Complaint-in-Intervention"), and the answers filed by the County in this case ("Answers").

The BLM is committed to carrying out its mandates pursuant to the Materials Act and FLPMA. Pursuant to these statutes, and related regulations, the BLM has engaged in a series of decisions resulting in a determination to allow the mining of sand and gravel minerals from the federally-owned mineral estate. As part of this process, the BLM approved CEMEX's Project, providing for the production of 56.1 million tons of federally-owned resources located on a 460-acre parcel in the Soledad Canyon area of Los Angeles County ("Project Site"), with an anticipated royalty to the United States Government of a minimum of $28 million pursuant to and following the issuance in 1990 of two federal mineral material contracts ("Federal Contracts") to CEMEX's predecessor-in-interest, Transit Mixed Concrete Company (referred to hereafter as "TMC") and following lengthy environmental analysis and public review. True and correct copies of the Federal Contracts are attached collectively hereto as **Exhibit A**.

The BLM engaged in and completed a nearly 15-year land-use and environmental review process for the Project. This process included: (1) a Federal Court-approved

settlement in 1988, in which the BLM determined to put the Federal mineral material at the Project Site up for bid; (2) a public bid process in which up to 100 million tons of Federally-owned mineral material at the Project Site was determined to be put up for sale; (3) the award of the two Federal Contracts to TMC in 1990, providing for the mining and production of 56.1 million tons over a period of approximately 20 years; (4) further environmental analysis of Plaintiff's (then, TMC's) proposed mining Project, resulting in publication of a Federal Final Environmental Impact Statement ("Final EIS") pursuant to the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231 *et seq.*; (5) the issuance of a Federal Record of Decision (the "ROD") on August 1, 2000, approving the specific manner in which the proposed mining pursuant to the Federal Contracts is to occur, with the addition of specified mitigation measures ("Federally-Approved Project"); and (6) the affirmation of the ROD by the U.S. Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals ("IBLA").

The United States is committed to preserving and supporting the implementation of the BLM's decisions regarding the Project, as well as its overall management of federal lands.

The County is committed to carrying out what it asserts are its duties as a local lead agency under both the California Environmental Quality Act ("CEQA"), Public Resources Code §§ 21000 *et seq.*, and the Surface Mining and Reclamation Act ("SMARA"), Public Resources Code §§ 2710 *et seq. and the County's Surface Mining Permit Ordinance, L.A.C.C. § 22.56.1240 et seq.* Federal law relating to mining, as well as the federal decisions relating to the Project, preempt the County from denying the Project under the Property and

Supremacy Clauses of the United States Constitution. The County further acknowledges that actions which unlawfully conflict with, excessively delay, or otherwise frustrate implementation of the Project are similarly preempted.

CEMEX has pursued permitting and implementation of the Project for nearly thirteen years, and has incurred extraordinary costs during this process.

In addition to resolving all claims in CEMEX's Complaint filed in this case and the United States' Complaint-in-Intervention, the Parties enter into this Consent Decree to provide for the expeditious implementation of the Federally-Approved Project, including through implementation of additional conditions as agreed to herein, and to resolve CEMEX and the United States' claims without resort to continued litigation, and to avoid further costs and delay associated with such litigation.

Through this Consent Decree, the United States is guaranteed that federal laws and decisions relating to mining the Project Site are given full force and effect, while CEMEX is guaranteed that it will be able to implement the Federally-Approved Project without delay or interference by the County. The County, in turn, will avoid the extraordinary costs associated with complex and protracted litigation and a potentially adverse ruling in the underlying litigation. Additionally, the County, through this Consent Decree, will retain jurisdiction to complete its review and approval of the project as detailed herein including adoption of mitigation measures beyond those in the Federal EIS, and will also impose a number of Project Conditions not otherwise required under CEQA or SMARA that might otherwise be preempted as land use conditions.

Nothing in this Consent Decree is intended to alter the lawful exercise by the County of its police powers as provided by the United States and California Constitutions, nor to abridge its general compliance with the mandates of California law, except to the extent that County actions have or will interfere or conflict with, or otherwise frustrate federal laws and decisions relating to the field of federal mining projects, and as specifically exercised in the context of the Federally-Approved Project.

Each party represents that it is entering into this Consent Decree in good faith and in an effort to avoid expensive and lengthy litigation but without any admission or finding of liability or fault as to any allegation or matter.

II. GENERAL PROVISIONS

A. Definitions

The term "AEIDEIR" means the August 2000 Additional Environmental Information to the Draft Environmental Impact Report", a supplemental environmental document prepared by the County of Los Angeles pursuant to the California Environmental Quality Act.

The term "BLM" means the United States Department of Interior, Bureau of Land Management.

The term "Board" refers to the Board of Supervisors for the County of Los Angeles.

The term "CEMEX" means CEMEX, Inc. as well as its predecessors-in-interest in contract with the BLM, including Transit Mixed Concrete Company ("TMC"), and Southdown, Inc. ("Southdown").

The term "CEMEX Application shall mean the application for a surface mining permit, first submitted by CEMEX's predecessor-in-interest to the County of Los Angeles in 1991, and described as surface Mining Permit Number 91-165(5), for the Project as defined herein.

The term "CEQA" means the California Environmental Quality Act, California Public Resources Code §§ 21000 *et seq.*, and the regulations implementing that statute, located at Title 14 of the California Code of Regulations §§ 15000 *et seq.*

The term "CEQA Findings" refers to the findings and determinations made by the County relating to the extent to which the Project results in potential environmental impacts and the effect of measures imposed to mitigate those impacts as required pursuant to CEQA.

The term "Complaint" means the Complaint for Declaratory and Injunctive Relief, Writ of Mandate, and Damages, as amended, filed by CEMEX in this action.

The term "Complaint-in-Intervention" means the Complaint for Declaratory and Injunctive Relief filed by the United States of America, plaintiff-in-intervention in this action.

The term "Consent Decree" means the recitals and provisions set forth herein as stipulated and agreed to by the Parties, and which becomes effective and controlling on all Parties immediately following entry as a final judgment in this case by the U.S. District Court, Central District of California.

The term "County" means the County of Los Angeles, a subdivision of the State of California, and all its sitting

Supervisors, officers, agents, employees and all other persons associated with or affiliated with the County and acting in their official capacity relating to such association or affiliation.

The term "County-Approved Project" means:

a. The Federally-Approved Project; and
b. The environmental mitigation measures identified in the County's January 2004 Proposed Mitigation Monitoring and Reporting Plan ("January 2004 Proposed MMRP"), and
c. The Project Conditions as negotiated between the Parties during Court-ordered mediation in this case. Attached hereto as **Exhibit H** are the Project Conditions agreed to by the Parties during the course of the settlement negotiations. The Project Conditions represent additional Project requirements above and beyond the mitigation measures for the Project included as part of the County's review pursuant to CEQA, and have been agreed to by CEMEX and the United States in an effort to avoid expenses and undue delay on implementation of the Project.

The term "Court" means the United States District Court, Central District of California.

The term "DPW" means the County of Los Angeles' Department of Public Works.

The term "Effective Date" means the date this Consent Decree is entered as a final judgment by the Court.

The term "EIR" means Environmental Impact Report, as defined pursuant to CEQA and its implementing regulations.

The term "EIS" means Environmental Impact Statement, as defined pursuant to NEPA and its implementing regulations.

The term "ESA" means the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* and its implementing regulations.

The term "Federal Contracts" means the Federal Contracts for the Sale of Units of Materials No. 20139 and 22901, issued by the BLM to Transit Mixed Concrete Company, CEMEX's predecessor-in-interest, in March 1990.

The term "Federally-Approved Project" means the Project as analyzed by the BLM in the Final EIS published in June 2000, as approved by the BLK in the August 2000 Record of Decision, and as upheld by the Interior Board of Land Appeals on January 8, 2002;

The term "FLPMA" means the Federal Land Policy and Management Act, 42 U.S.C. §§ 1701 *et seq.*

The term "IBLA" means the Interior Board of Land Appeals, an appeals body within the Office of Hearings and Appeals of the U.S. Department of Interior.

The term "Lawsuit" shall mean that certian action entitled *CEMEX, Inc., et al. v. County of Los Angeles, et al.*, United States District Court for the Central District of California, Case No. CV-02-747 DT (FMOx).

The term "Materials Act" means the Materials Act of 1947, 30 U.S.C. §§ 601 *et seq.*

The term "NOI" means Notice of Intent, and is an official public notice as provided for pursuant to CEQA.

The term "NEPA" means the National Environmental Policy Act, 42 U.S.C. §§ 4231 *et seq.*, and its implementing regulations, contained at Title 40 of the Code of Federal Regulations §§ 1500 *et seq.*

The term "Parties" means CEMEX, the United States, and the County.

The term "Planning Staff" means the Los Angeles County Department of Regional Planning staff.

The term "Project" means the Soledad Canyon Sand and Gravel Mining Project, located in Los Angeles County, California, as provided by BLM Contracts for the Sale of Units of Material Nos. CA-20139 and CA-22901, including the mining and production of 56.1 million tons of Federally-owned sand and gravel on approximately 460 acres.

The term "Project Findings" refers to the findings and determinations made by the County relating to the Project's compliance with County regulations.

The term "Project Site" means the federally-owned mineral estate located on a 460-acre parcel in the Soledad Canyon area of unincorporated Los Angeles County and which is subject to the Federal Contracts.

The term "ROD" means the BLM's record of Decision for the Project, issued on August 1, 2000 pursuant to NEPA.

The term "RNFSA" means the Reduced North fines Storage Area, a section of the northern portion of the Project Site where CEMEX had intended to place excess fine materials that resulted as a by-product of mining activities.

The term "RNFSA Alternative" means the Reduced North Fines Storage Area Alternative, the Project alternative selected by BLM as the Federally-Approved Project in the ROD.

The term "SRHA" means the Stock-Raising Homestead Act, 43 U.S.C. § 299.

The term "SMARA" means the Surface Mining and Reclamation Act, California Public Resources Code §§ 1720 *et seq.*, and its implementing regulations contained in Title 14 of the California Code of Regulations §§ 3500 *et seq.*

The term "SOC" means Statement of Overriding Considerations, which identifies residual significant impacts of a project, and benefits of project implementation, as required pursuant to CEQA.

The term "TMC" means Transit Mixed Concrete Company, CEMEX's predecessor-in-interest.

B. Jurisdiction

The Court has jurisdiction over the subject matter and over the Parties pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, to declare and enforce the rights and other legal relations of Plaintiff CEMEX under Federal law, including the Property and Supremacy Clauses of the United States Constitution, U.S. Const. Art. IV, § 3, cl. 2 and Art. VI, cl. 2, the Materials Act of 1947, 30 U.S.C. §§ 601 *et seq.*, and regulations relating to the same, and pursuant to 42 U.S.C. § 1983 to redress the deprivation under color of statute, ordinance, regulations, custom or usage of rights, privileges and immunities secured to Plaintiff CEMEX by the Fifth and Fourteenth Amendments to the Constitution of the

United States, as well as for money damages. Jurisdiction is confirmed in this Court by 28 U.S.C. §§ 1331 and 1343(3), which confer original jurisdiction on Federal District Courts in suits to redress or prevent the deprivation of rights, privileges and immunities as stated above. Jurisdiction in this Court is also confirmed pursuant to 28 U.S.C. § 1345, which grants this Court original jurisdiction of all civil actions commenced by the United States as a plaintiff. The Court also has jurisdiction over the subject matter on the basis of supplemental jurisdiction pursuant to 28 U.S.C. § 1367, as already determined by this Court. [*See* July 30, 2002 Order Granting in Part and Denying in Part County of Los Angeles' Motion to Dismiss the Second Amended Complaint for Failure to State a Claim Upon Which Relief Can be Granted, or in the Alternative, Motion to Abstain From the Exercise of Jurisdiction, at 20:1 to 21:20.]

The Complaint filed herein states claims for which, if the allegations were proved, relief could be granted. For the purposes of this Consent Decree, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Further, all Parties consent to the jurisdiction of this Court and warrant not to contest the Consent Decree. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

C. Agents for Service of Process and Notices

All notices, requests, demands, or other communications under this Consent Decree shall be in writing. Notice shall be sufficiently given for all purposes as follows:

(1) When personally delivered to the recipient, notice is effective on delivery.

(2) When delivered by overnight delivery by Federal Express, Airborne or United Parcel Service, charges prepaid or charged to the sender's account, notice is effective on delivery, if delivery is confirmed by the delivery service.

(3) When sent by fax to the last fax number of the recipient known to the party giving notice, notice is effective on receipt, provided that (a) a duplicate copy of the notice is promptly given by first-class or certified mail or by overnight delivery, or (b) the receiving party delivers a written confirmation of receipt. Any notice given by fax shall be deemed on the next business day if it is received after 5:00 p.m. (recipient's time) or on a non-business day.

(4) When sent by United States Mail, notice is effective on receipt, after it has been deposited in the United States mail, duly registered or certified, with postage prepaid, and addressed a set forth below:

To County of Los Angeles:
County Counsel, County of Los Angeles
c/o Richard D. Weiss,
Acting Assistant County Counsel
821 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012
Facsimile: (213) 617-7182

Courtesy Copy:
Fox & Sohagi
Deborah J. Fox, Esq.

10960 Wilshire Boulevard, Suite 1270
Los Angeles, CA 90024-3702
Facsimile: (310) 444-7813

To United States of America
U.S. Department of Justice
Environmental & Natural Resources Department
c/o Edward S. Geldermann, Esq.
General Litigation Section
601 D Street N.W., Room 3126
Washington, D.C. 20004
Facsimile: (202) 305-0506

Assistant United States Attorney
Vince Farhat
Room 7516, Federal Building
300 North Los Angeles St.
Los Angeles, CA 90012
(213) 894-2872

To CEMEX, Inc.
Jeffer, Mangels, Butler & Marmaro, LLP
c/o Kerry Shapiro
Two Embarcadero Center, Fifth Floor
San Francisco, CA 94111
Facsimile: (415) 398-5584

D. Parties Bound

United States: Plaintiff-in-Intervention United States represents the interests of BLM, the U.S. Department of Interior, and the United States of America in this action. Under the Materials Act, the Secretary of Interior is authorized to dispose of mineral materials on public lands of the United States through a competitive bidding process. (30

U.S.C. §§ 601, 602.) This authority has been delegated to authorized agents of the BLM by the Department of the Interior Manual. Under FLPMA, the Secretary has been authorized to "develop, maintain, and, when appropriate, revise land use plans which provide . . . for the use of public lands." 43 U.S.C. § 1712(a). "Public lands" in FLPMA is defined to include "any interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management." 43 U.S.C. § 1712(e). The Secretary's land-use planning authority has been delegated to the BLM. 43 U.S.C. § 1601.0-3.

CEMEX: Plaintiff CEMEX is a Louisiana corporation qualified to do business in the State of California. CEMEX's predecessors-in-interest with respect to the Project include Southdown, Inc., dba Transit Mixed Concrete Company. The permit and other applications for the Project at issue herein were originally applied for by TMC, before its name changed to CEMEX. ("TMC" and "CEMEX" are thus sometimes used interchangeably in this Consent Decree.)

County: Defendant County of Los Angeles is a public body, corporate and politic, and a subdivision of the State of California. Pursuant to Section 23004 of the California Government Code, the County is subject to this suit. Under SMARA, the County is ordinarily responsible as "lead agency" for review of surface mining projects, including approval of reclamation plans and adoption of financial assurances. Under CEQA, the County is ordinarily responsible as local "lead agency" to analyze under State law potential environmental effects of development projects potentially affecting the environment that are subject to discretionary approvals, generally including surface mining projects.

E. Successors and Assigns

This Consent Decree and all representations, agreements or stipulations contained herein shall constitute binding, continuing obligations between the Parties and shall inure to the benefit of and shall be binding upon the Parties hereto, by and through their officials, agents, employees and successors, and shall be binding upon their heirs, personal representatives and permitted successors in interest.

F. Implementation of Consent Decree

1. Effective Date

This Consent Decree shall become effective immediately upon entry by the U.S. District Court. The County shall implement immediately all provisions of this Consent Decree, and, as expressly stated below, no later than sixty (60) days after the effective date of this Consent Decree, the County shall complete all actions relating to certification and completion of the Final EIR, adoption of Findings and the SOC, issuance of a Surface Mining Permit, and approval of a Reclamation Plan and Financial Assurances Cost Estimate, as detailed herein.

2. Enforceability

A Party seeking enforcement of this Consent Decree may file for an order to show cause why the breaching Party should not be held in contempt and/or subject to appropriate contempt sanctions by the Court. Any failure to timely act or comply with the obligations set forth in this Consent Decree which has a material adverse impact on one of the Parties shall be deemed a material breach of this Consent Decree.

The Court orders that this case be administratively closed pending further order of the Court. The Court expressly hereby retains jurisdiction over any actions relating to the Consent Decree, its constituent parts and related actions required pursuant thereto.

The Court further orders that if any Party reasonably believes a Party has materially breached any of its obligations under the Consent Decree, then pursuant to the Consent Decree, it may file a motion in this Court seeking such a determination. Upon making such a determination, the Court may order whatever relief it deems appropriate, consistent with the Consent Decree, where relevant.

In the event of a material breach which arises out of an intentional effort by the County to materially delay, frustrate or prevent the timely and successful implementation of the County Approved Project, then CEMEX and the United States may seek the additional remedy of making a Motion to Dissolve and Set Aside the Consent Decree and seek to reinstate the Lawsuit ("Motion to Dissolve") and to revive the Lawsuit as it existed as of the day prior to the execution of the Consent Decree. In the event a Party successfully moves to dissolve the Consent Decree, neither this Consent Decree nor any County approvals related to this Consent Decree shall be admissible for any purpose in the revived lawsuit. This additional remedy is available where the County, through its Official Policy Makers (as that term is defined herein)[1], acting

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[1] "Official Policy Makers" includes those recognized and defined under the body of case law interpreting 42 U.S.C. § 1983 which the Parties agree include at a minimum the County Supervisors, the County Counsel, Department Heads, the Chief Administrative Officer, and (for purposes of this enforcement provision) Conal McNamara, Millie Jones and Bob Haueter for so long as they remain employed by the County. The Parties hereby stipulate that the agreed-upon definition of the term

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either directly or indirectly, engages in or encourages a course of conduct intended to materially delay, frustrate or prevent the timely and successful implementation of the County Approved Project. The Parties specifically recognize as well the concept of deliberate indifference and acknowledge that this concept is also applicable in assessing the County's actions and whether a material breach has occurred under this provision. Consequently, this additional remedy is also available where the County acts with deliberate indifference with respect to the conduct of non-Official Policy Maker agents or employees.

It is specifically understood among the Parties that in interpreting the preceding paragraph, intent will be determined using an objective standard and that intent may be inferred from conduct based on the assumption that a reasonable person intends the natural and logical consequences of his or her actions.

The Parties recognize that there will be a significant gap between the time this Consent Decree was conceptualized and the time of its implementation. Conduct occurring on and

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"Official Policy Makers" and the manner in which it is interpreted and applied herein shall not constitute an admission by any Party as to the scope and meaning of the term "Official Policy Makers" under 42 U.S.C. § 1983, or any other body of law, to the extent that term may relate to claims, assertions, or defenses in the Lawsuit or any other litigation between the Parties. The Parties hereby recognize that as to the individuals named any asserted acts must be within their employment capacity while recognizing that these individuals retain certain protected First Amendment rights which are not precluded by this Consent Decree. The determination of whether conduct is protected by the First Amendment, as opposed to conduct attributable to the County under this agreement, shall be determined by a consideration of the totality of the circumstances surrounding the conduct.

after April 22, 2003 and before October 1, 2003, is defined as "Retroactive Conduct." Neither CEMEX nor the United States shall be required to disclose Retroactive Conduct.[2] If CEMEX or the United States chooses to disclose Retroactive Conduct known to them to the County on or before October 9, 2003, then CEMEX and/or the United States may use the Retroactive Conduct disclosure to support a Motion to Dissolve or other motion for contempt for violation of the Consent Decree, and the Court may consider the disclosed Retroactive Conduct in determining the County's actions. Should CEMEX or the United States pursue a Motion to Dissolve or other motion for contempt for violation of the Consent Decree, the moving Party shall be precluded from using any Retroactive Conduct known to it but not disclosed to the County by October 9, 2003. Any Motion to Dissolve or other motion for contempt for violation of the Consent Decree seeking to use undisclosed Retroactive Conduct must be accompanied by a declaration reciting how and when the undisclosed Retroactive Conduct became known to CEMEX or the United States. Undisclosed Retroactive Conduct may be used only if such declaration (together with such other evidence as the court may entertain or require) establishes to the Court's satisfaction that the undisclosed Retroactive Conduct relied upon did not become known to CEMEX or the United States until after October 1, 2003. Notwithstanding the foregoing provisions of this paragraph, no Retroactive Conduct may be used to support a Motion to Dissolve or other motion for contempt for violation of the Consent Decree and no Retroactive Conduct may be considered by the Court in determining the County's actions after expiration of 24 months following the startup of the County's Approved

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[2] The option to not disclose (and forego the use of) known Retroactive Conduct allows CEMEX and the United States to protect sources through which knowledge of such conduct was obtained.

Project.[3]

Any conduct occurring after October 1, 2003 shall be defined as "Prospective Conduct." Prospective Conduct may be used in connection with a Motion to Dissolve or other motion for contempt for violation of the Consent Decree without the need for prior disclosure by CEMEX or the United States.

The County represents and warrants that it will issue instructions to its Official Policy Makers and to its non-policy making agents and employees who are involved in any non-incidental aspect of the implementation or administration of the County Approved Project regarding its and their obligations under this Consent Decree. Further, the County specifically agrees to include Conal McNamara, Millie Jones, Bob Haueter, Frank Meneses and Tom Alexander, and the staff of each of the Board officers on this notification list. The County agrees to republish and distribute such instructions on an annual basis to its Official Policy Makers and to those individuals that have a non-incidental role in the implementation of the County Approved Project during the period of time during which this Consent Decree is in effect and being implemented. The County represents and warrants that it will take appropriate corrective action in the event it comes to its attention that any of its non-policy making employees or agents is violating the instructions given or otherwise acting in a way inconsistent with the County's obligations under this Consent Decree. The County will take such action promptly, so as to avoid or mitigate any materially adverse effect upon the County Approved Project or the implementation of this

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[3] "Startup of the County Approved Project" means when shipping off site of materials subject to royalty payment under the initial Bureau of Land Management contract commences.

Consent Decree. It is understood between the Parties that the failure to take appropriate corrective action in response to known violations of such instructions (or upon learning of any action of any agent or employee inconsistent with its obligations under this Consent Decree) will constitute deliberate indifference on the part of the County and make such action attributable to the County.

The County further represents and warrants that it will take appropriate corrective action in the event it comes to its attention that any of its Official Policy Makers are violating the instructions given or otherwise acting in a way inconsistent with the County's obligations under this Consent Decree. The taking of corrective action with respect to the actions of Official Policy Makers will not exonerate the County from the effects of those actions, but may be considered by Judge Phillips or the Court in determining the scope of the penalty on any motion to dissolve or motion for contempt violation. The taking of corrective action with respect to the actions of Official Policy Makers will not be evidence that such actions are in violation of this Consent Decree.

Prior to seeking dissolution of the Consent Decree as provided for herein, and after completion of the meet and confer process noted below CEMEX and the United States shall tender the matter to Retired Judge Layn R. Phillips for the purpose of making a non-binding recommendation to the Court as to whether or not the trigger has been satisfied to justify this additional remedy. Judge Phillips shall expeditiously render such a non-binding recommendation.[4]

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[4] In the event Judge Phillips is not available, the matter shall similarly be tendered to retired Judge John Leo Wagner for non-binding recommendation. In the event neither Judge Phillips nor Judge Wagner are available, CEMEX or the United States may apply directly to the

Although CEMEX and the United States may not move to seek this additional remedy without first seeking a non-binding determination from Judge Phillips, it is understood that CEMEX and the United States may nevertheless apply to the Court for such additional relief even in the face of an adverse recommendation by Judge Phillips. It is further understood by the Parties, that the Court may in its discretion grant or deny the Motion to Dissolve or impose a sanction less severe than dissolution of the Consent Decree.

In the event of any action, motion or proceeding among the Parties in connection with the Consent Decree, the prevailing Party shall be entitled to recover its reasonable attorneys' fees in prosecuting or defending such action, motion or proceeding.

If either Party believes that the other Party is in violation of this Consent Decree, said Party shall, if practicable, prior to commencing any action to enforce this Consent Decree, first participate in a good faith attempt to resolve said dispute, as follows:

The complaining Party shall give written notice of the asserted violation to the other Party. Said notice shall be in sufficient detail to permit the respondent to evaluate the complaint and to formulate a response. The notice shall set forth a request for a meeting regarding the asserted violation(s). Counsel for the Parties shall confer in a good faith effort to cure the asserted violation, eliminate the necessity of an enforcement action or to eliminate as many of the disputes as possible. It shall be the responsibility of counsel for the complaining Party to arrange for this conference. If all participating counsel are located within the

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Court for such additional relief.

same county of the Central District, the conference shall take place in person at the office of the moving party's counsel, unless the Parties agree to meet someplace else. If all participating counsel are not located within the same county of the Central District, the conference may take place telephonically. Unless relieved by written order of the Court upon good cause shown, counsel for the opposing Party shall confer with counsel for the moving Party within ten (10) court days of service upon him/her of a letter requesting such conference. The moving Party's letter shall identify each issue in dispute and claimed violation, shall state briefly with respect to each such violation the moving Party's position and specify the terms of the resolution to be sought. Such meet and conference process shall be in lieu of the conference of counsel requirements set forth in the Local Rules of the Central District of California.

If the asserted violation is not resolved to the satisfaction of the moving party by the conclusion of the meeting of counsel, and the moving Party does not believe that further informal attempts by counsel will affect a satisfactory resolution, the moving Party then may seek appropriate relief from the Court.

3. Duration of Consent Decree

This Consent Decree shall remain in place until the Federal Contracts between CEMEX and the United States have expired, or are otherwise terminated by the Parties thereto or by operation of law.

4. Complete Agreement

Except as expressly provided in **Exhibit H**, this Consent Decree shall constitute the entire integrated agreement of the

Parties. There are no representations or agreements between the Parties hereto relating to the subject matter contained herein other than contained in this Consent Decree. This Consent Decree (and the exhibits attached hereto and documents incorporated herein by reference) is the complete and final integration of all arrangements and agreements between the Parties hereto regarding the subject matter hereof and supersedes all prior written or oral and all contemporaneous oral representations, understandings, or agreements between the Parties regarding the subject matter hereof. Any amendment of or supplement to this Consent Decree must be in writing and executed by all of the Parties hereto. This Consent Decree shall not be construed to contain any implied covenants other than the covenant of good faith and fair dealing.

5. Incorporation by Reference

All of the exhibits attached hereto or referenced to herein and all documents in the nature of such exhibits, when executed, are by this reference incorporated herein and made a part of this Consent Decree.

6. Captions

None of the Captions of the paragraphs of this Consent Decree shall be construed as a limitation upon the language of such paragraphs, said captions having been inserted as a guide and a partial index and not as a complete index of the contents of the paragraphs.

7. Authority

Each Party hereby represents and warrants to the others that: (1) it has the full power, right and authority to execute

this Consent Decree and hereunder, and (2) all procedures and approvals that are necessary and required to enable it to execute this Consent Decree and perform hereunder, and to bind all individual or entities whom it represents, have been followed and/or secured.

8. No Admission

The existence and execution of this Consent Decree by CEMEX is not intended, and shall not be construed, as an admission by CEMEX, or any of its parent corporations, subsidiaries, or affiliates, or any of its respective officers, directors, employees, agents shareholders, representatives or affiliates, of any deficiency, limitation, liability, error, violation or omission of any nature whatsoever, including without limitation any past or current violation under CEQA, SMARA, Los Angeles County's Code, or any other Federal, State or County laws or regulations.

Nothing in this Consent Decree shall be cited to as, or be deemed, an admission by the United States that any of the Project Conditions specified in **Exhibit H**, and/or any other provision of this Consent Decree, constitute permissible environmental regulation by the County, and do not constitute impermissible state and/or local land-use regulation of the Project. Nothing in this Consent Decree shall be cited to, or be deemed an admission by the United States that this Project is subject to regulation under CEQA, SMARA and/or the County's Surface Mining Permit Ordinance, LA.M.C. 22.56.1240, and/or that the procedures required by CEQA, SMARA, and/or the County's Surface Mining Permit Ordinance, constitute permissible environmental regulation of the Project.

By entering into this Consent Decree, the County is not admitting any legal or equitable liability under any federal, state, or local statute, regulation, ordinance, or the common law, arising out of any of the occurrences alleged in the underlying complaints.

9. Cooperation

a. Generally. The Parties hereto agree there is a duty of good faith and fair dealing with regard to the Consent Decree and actions called for hereunder and agree to cooperate in executing any other or further documents, decisions or actions necessary to carry out the provisions of the Consent Decree.

b. County of Los Angeles. The County will complete its review and approval of the Project as detailed herein and consistent with the terms agreed to in this Consent Decree and any additional requirements imposed by the District Court in good faith and using due diligence, including the following items:

- Completion and certification of a Final EIR for the Project;
- Preparation of Findings for the Final EIR;
- Preparation of a Statement of Overriding Considerations;
- Approval of a Surface Mining Permit;
- Approval of a Reclamation Plan;
- Preparation of Findings for the Surface Mining Permit; and
- Approval of Financial Assurances.

10. Release

Except as otherwise provided herein, and except as to those obligations expressly assumed in this Consent Decree, and further subject to the prior execution and entry of the Consent Decree, Plaintiff and Plaintiff-in-Intervention do hereby and forever release and discharge the County from any and all causes of action, actions, judgments, liens, indebtedness, damages, losses, claims, liabilities and demands of whatsoever kind and character in any manner whatsoever arising from or attributable to the dispute described in the pending Complaint and Complaint-in-Intervention.

Except as otherwise provided herein, and except as to those obligations expressly assumed in this Consent Decree, and further subject to the prior execution and entry of the Consent Decree, the County does hereby and forever release and discharge Plaintiff and Plaintiff-in-Intervention from any and all causes of action, actions, judgments, liens, indebtedness, damages, losses, claims, liabilities and demands of whatsoever kind and character in any manner whatsoever arising from or attributable to the dispute described in the pending Complaint and Complaint-in-Intervention.

11. Modifications to the Consent Decree

The Parties may jointly stipulate to make changes, modifications and amendments to this Consent Decree, but such actions shall only be effective upon review and entry by this Court.

12. Interpretation of Consent Decree

Each of the Parties hereto has agreed to the use of the particular language of this Consent Decree (and all attached

exhibits), and any questions of doubtful interpretation shall not be resolved solely by any rule or interpretation providing for interpretation against the party who causes the uncertainty to exist or against the draftsman.

13. Severability

If any provision of this Consent Decree is deemed or held to be illegal, invalid or unenforceable under any present or future laws, and the deletion of such provision would not deny any Party the substance of the benefits intended to be conferred or received hereunder, such provision shall be fully severable and this Consent Decree shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part hereof; and the remaining provisions hereof shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance herefrom. Furthermore, in lieu of such illegal, invalid, or unenforceable provision there shall be added automatically as part of this Consent Decree a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible to be legal, valid, and enforceable.

In the event that any court invalidates any aspect of the Consent Decree, then the Parties as part of their duties to cooperate as found in Section 9 of this Consent Decree, shall exhaust reasonable efforts to remedy any identified defect(s) to insure that the Parties are provided the substance of the benefits conferred under this Consent Decree. If, and only if, the noted defects are incapable of being remedied in a way that would allow for the successful implementation of the County Approved Project within a reasonable time period, after an exhaustion of the above referenced efforts, then any Party hereto may make application to the Court entering this

Consent Decree, to dissolve and set aside the Consent Decree and the provisions thereof, and if the Court, upon proper showing, grants such application, the Lawsuit shall be reinstated and revived as of the day prior to the execution of the Consent Decree. Prior to seeking such application, a Party shall tender the matter to Retired Judge Layn Phillips for the purpose of providing a non-binding recommendation to the Court on any factual determinations including: 1) the ability to remedy the defects; 2) the reasonable efforts of the Parties; and/or 3) the ability to obtain the benefit of the County-Approved Project. Judge Phillips shall expeditiously make such non-binding recommendation.[5] Although a party may not move to set aside the Consent Decree before first obtaining a non-binding recommendation from Judge Phillips, it is understood that a Party may nevertheless apply to the Court to set aside the Consent Decree even in the face of an adverse recommendation by Judge Phillips. The purpose of this recommendation is to provide both the Parties and the Court with the views of the retired judge who assisted the Parties in reaching this Consent Decree before any Party moves to set it aside. In making the factual determination as to whether the benefit of the County Approved Project is retained, the determination shall focus on whether the efforts to correct any defects on remand have been unreasonably delayed, or to the extent the project is approved, whether the project has been approved in substantial conformance with the conditions found at **Exhibit H**. In the event that both Retired Judge Layn Phillips and Retired Judge John Leo Wagner are unavailable to render a non-binding recommendation, a party

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[5] In the event Judge Phillips is not available, the matter shall similarly be tendered to retired Judge John Leo Wagner for non-binding recommendation. In the event neither Judge Phillips nor Judge Wagner are available, CEMEX or the United States may apply directly to the Court for such additional relief.

may move to set aside the Consent Decree without first having to seek a non-binding recommendation.

14. Waiver

Neither this Consent Decree, nor any of the terms hereof, may be waived, discharged, modified, or amended orally, but rather only by an instrument in writing signed oy the Party against whom any such waiver, discharge, modification or amendment is sought.

15. Attorneys' Fees

Each side shall bear its own attorneys' fees and costs in this underlying litigation that is the subject of the Complaint and the Complaint-in-Intervention.

16. Limitations as to the United States

Nothing in this Consent Decree shall be interpreted as, or shall constitute, a commitment or requirement that the United States, or any party or agency thereof, obligate or pay funds, or take any other action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

Nothing in this Consent Decree shall be construed to deprive a federal official of authority to comply with all applicable federal statutes and regulations, or to revise, amend or promulgate regulations.

17. Counterparts; Facsimile

This Consent Decree may be executed simultaneously or in any number of counterparts, each of which shall be deemed

an original, but all of which together shall constitute one and the same Consent Decree. Facsimile signatures on this Consent Decree shall be binding as if original.

18. Reservation of Police Power

Subject to the express limitations and obligations set forth in this Consent Decree, nothing shall prevent the County from exercising its police power in order to protect the health, safety and welfare of the public, and, subject to the foregoing limitations, the County does herein reserve the right to take any lawful enforcement action predicated on the same. Nothing in this provision shall be construed as authorizing the County to take action that is preempted by federal law.

G. Subsequent Actions Affecting Consent Decree

The Parties hereby agree to defend the provisions of this Consent Decree and further specifically agree not to knowingly and materially facilitate, induce or assist in the bringing or prosecution of any administrative or judicial challenges to the Consent Decree or the County Approved Project, including without limitation, through actions taken to influence the South Coast Air Quality Management District or other agencies with regulatory authority over the County Approved Project.

The Parties shall timely notify each other of any court or administrative challenge to this Consent Decree, or any challenge to the successful implementation of the County Approved Project. In the event that any provision of this Consent Decree is challenged in any local or state court, removal to the federal court entering this Consent Decree shall be sought by the Parties. The terms and obligations of this paragraph shall be in addition to, and shall not modify, the

obligations set forth as Condition 3 of the Project Conditions set forth in **Exhibit H**, attached hereto.

III. STIPULATED FACTUAL BACKGROUND

A. Project Overview

The Project Site is a "split estate" in which the mineral estate is owned by the United States of America, and the surface estate is now held in private ownership, following the Federal Government's transferring, also known as "patenting", of the surface estate into private ownership in 1934, pursuant to the Stock-Raising Homestead Act of 1916, 43 U.S.C. §299 "SRHA").

The Project Site is located in the Soledad Canyon area of unincorporated Los Angeles County, approximately 30 miles from downtown Los Angeles. In 1987, the Project Site and adjacent areas were formally designated by the State of California, State Mining and Geology Board as a "Regionally Significant Construction Aggregate Resource Area" pursuant to SMARA. This designation was based upon the quality of the mineral material, and the need for and diminishing availability of such material in the region. State designation seeks to protect identified important mineral resources from permanent loss due to encroachment by urbanization.

Under the Materials Act the Secretary of the Interior is authorized to dispose of mineral materials on public lands of the United States through a competitive bidding process. (30 U.S.C. §§ 601, 602). This authority has been delegated to authorized agents of the BLM. (*See* 43 C.F.R. Subpart 3610). In 1989, the BLM offered for competitive sale the rights to mine up to 100 million tons of Federally-owned sand and gravel aggregate material on the Project Site.

The BLM's decision to offer the aggregate material for sale followed a 1983 U.S. Supreme Court ruling clarifying that gravel is a mineral reserved in the Federal "mineral estate" under the SRHA. (*Watt v. Western Nuclear,* 462 U.S. 36, 103 S.Ct. 2218 (1983)). At that time, an existing mining operator, Canyon Country Enterprises, Inc., dba Curtis Sand and Gravel ("Curtis"), was mining the Project Site without any federal authorizations. The United States engaged in a series of actions against Curtis for mineral trespass and related claims, resulting in a 1988 settlement with Curtis of the mineral trespass claim, the terms and implementation of which were subsequently upheld by the Ninth Circuit Court of Appeals. The County was not involved in the prior lawsuit with Curtis.

In 1989, the BLM prepared an Environmental Assessment pursuant to NEPA for the Notice of Sand and Gravel Sale, analyzing the sale and removal by truck transportation of up to 100 million tons of sand and gravel, after specifically consulting with the County of Los Angeles Department of Public Works ("DPW") in the development of the analysis. As stated in the 1989 Environmental Assessment, the decision by the Federal Government to allow further mining to continue at the Project Site, and thus to put the material up for competitive bid, was based on the following: (1) resolution in 1988 of the Curtis trespass litigation, (2) the 1987 State designation of the mineral resources at the Project Site; (3) the County's identified need for construction aggregate material; and (4) the years of prior mining, from 1968 to 1988, consistent with the established County zoning at the Project Site for mining.

In September 1989, the BLM determined CEMEX (then TMC) to be the successful bidder, and in March 1990, the BLM issued the two Federal Contracts to TMC, conferring upon TMC the right to produce and sell approximately 56.1

million tons of sand and gravel.

In 1991, following an unsuccessful District Court challenge by Curtis, the Ninth Circuit upheld the validity of the bid process and the award of the Federal Contract to TMC.

B. Federal Environmental Review of the Project

In May 1990, as part of the implementation of the Federal Contracts, TMC submitted to the BLM for review a proposed mining and reclamation plan allowing for aggregate mining and production of ready-mixed concrete from the Project Site. On October 16, 1995, the BLM published in the Federal Register a Notice of Intent ("NOI") to prepare a Draft EIS pursuant to the provisions of NEPA, to analyze the potential environmental impacts of the proposed action.

On January 14, 1998, following formal consultation with the BLM pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, the U.S. Fish and Wildlife Service ("Service") released its "Biological Opinion for Transit Mixed Concrete's Application to Mine Sand and Gravel in Soledad Canyon" ("1998 Biological Opinion") which is incorporated into this Consent Decree by this reference. The 1998 Biological Opinion addressed possible impacts of the Project on the unarmored threespine stickleback fish (*Gasterosteus aculeatus williamsoni*) ("UTS"), and found that the Project was not likely to jeopardize the continued existence of the UTS. The 1998 Biological Opinion included a statement allowing for "incidental take" of this species.

In April 1998, CEMEX informed the County of its position that the on-going delays by the County in the County's concurrent environmental review process were delaying the BLM EIS process.

On June 2, 2000, the BLM completed and published the Final EIS for the Project, consisting of eight volumes and over 2,000 pages. The Final EIS, which is incorporated into this Consent Decree by reference, incorporated changes and additional mitigations based on public comments received on the Draft EIS, a Supplemental Draft EIS ("SDEIS"), and technical appendices, including a formal "conformity determination" and accompanying analysis that the Project is in conformity with all applicable Federal and state air quality regulations. The Final EIS concluded that all potential adverse impacts were mitigated to a level of less than "significant" but for two: air quality and visual. The Final EIS not only included written responses to written and oral public comments on the Draft EIS and SDEIS, but also included responses to comments on the Los Angeles County Draft EIR for the Project, which was being prepared contemporaneously.

On August 1, 2000, the BLM published its Record of Decision ("ROD"). A true and correct copy of the August 1, 2000 Record of Decision is attached hereto as **Exhibit B**. A "record of decision" documents a Federal agency's decision-making process, e.g., for an "approval", including the considerations and factors leading up to the ultimate decision, with respect to an application for permit or other such agency action. The Rod approved the following components collectively comprising the Federally-Approved Project:

- A Reduced North Fines Storage Area Alternative ("RNFSA Alternative"), allowing for extraction and processing of 56.1 million tons of sand and gravel by TMC over approximately 20 years, in conformance with the Federal Contracts issued in 1990;

- A Mining and Reclamation Plan as described in the Final EIS, consistent with the RNFSA Alternative;

- Incorporation of the terms and conditions of the 1998 Biological Opinion for the UTS, and a Habitat Protection Plan included in the Final EIS;

- Findings that traffic impacts were minimized, thereby allowing delivery of said mineral material product to the market by way of truck transportation;

- Findings that water resources were adequately protected, thereby allowing diversion of water from the Santa Clara River;

- Findings that the Project as approved conformed with all applicable local, State and Federal laws, regulations and statutes pertaining to air quality; and

- Findings that public health and safety are protected, based on coordination and fact-finding with agencies and organizations including the South Coast Air Quality Management District, the U.S. Environmental Protection Agency, and the Southern California Association of Governments.

In September 2000, various Project opponents filed appeals of the ROD with the IBLA.

In May and June of 2001, biologists hired by Project opponents discovered arroyo toad (*Bufo Californicus*) tadpoles, a Federally-listed species under the ESA, in the Santa Clara River in a portion of the Project Site. Following

this discovery, the BLM re-initiated consultation with the Service pursuant to the ESA, and issued a Supplemental Biological Assessment on August 6, 2001. Following this, the Service issued a new Biological Opinion ("2001 Biological Opinion"), which is incorporated herein by this reference, finding that the Federally-Approved Project was not likely to jeopardize the continued existence of the arroyo toad.

On January 8, 2002, following fifteen months of extensive briefing and review, the IBLA published a decision affirming the ROD and the BLM's analysis of the environmental impacts of the Federally-Approved Project under NEPA. (**Exhibit C** hereto)

C. County Environmental Review of the Project

The County's environmental review under CEQA began in May 1991, when TMC submitted to the County an application for a surface mining permit and approval of a reclamation plan, in accordance with SMARA and the County's surface mining permit ordinance.

In 1993, a "Screencheck" (i.e., internal or administrative) Environmental Impact Report ("EIR") for the Project was prepared by TMC in accordance with CEQA and submitted to the County Department of Regional Planning ("Planning Staff"). The Screencheck EIR was subject to extensive environmental review over a number of years by the County. In response to County comments, an updated mining and reclamation plan was submitted to the County in 1996.

Beginning in 1995, both the BLM, on at least one occasion, and TMC, on several occasions, urged the County to prepare a joint environmental document in compliance with both NEPA and CEQA in order to avoid unnecessary delays

and costs, but the County rejected this suggestion on multiple occasions.

The County environmental review went through a long review process beginning in 1991 and continuing through 2001. CEMEX alleges that adding to the delay was the County's review of the Bee Canyon mobile home project and a site adjacent to the Project Site, which was at one time proposed on a portion of the Project Site, and which potentially conflicted with development of the Project, including removal of 400,000 tons of Federally-owned mineral from the Project Site. The Bee Canyon mobile home project was finally taken off calendar in part due to CEMEX's and the BLM's opposition.

In February 1999, a completed Draft EIR was then circulated by the County for nine months of public review and comment between February 1999 and November 1999, more than seven months longer than the 45-day review period required under CEQA.

A document entitled Additional Environmental Information to the Draft EIR document ("AEIDEIR") was later prepared in August 2000, and circulated for a 60-day public review period (until October 17, 2000), and the County noticed a public hearing on the CEMEX appeal and County AEIDEIR for October 24, 2000. The AEIDEIR was prepared in order to make the Project description in the County's EIR consistent with the BLM's published June 2000 Final EIS and approved August 2000 ROD, by re-describing the proposed Project to now consist of the previously analyzed RNFSA Alternative, i.e., the Federally-Approved Project, which had been recommended for approval by the County Planning Staff back in April 1999, and thus provided only limited new environmental analysis beyond what was presented to the

Planning Commission or in the BLM's Final EIS.

Eight years after CEMEX submitted its application to the County in 1991, the hearing process before the County formally began with the Planning Commission in April 1999.

In April 1999, County Planning Staff issued a Staff Analysis for the Project, wherein it recommended approval of the RNFSA Alternative, i.e. the Federally-Approved Project, based on the Draft EIR and County Staff's conclusion that it was the most feasible "environmentally superior alternative" for the proposed Project. The Staff Report prepared by the County's professional Planning Staff recommended approval in part based on the following: the need for additional permitted aggregate resources in Los Angeles County; the State of California's designation of Soledad Canyon area (including the Project Site) as a regionally significant mineral resource; and the fact that the Project would provide needed material with fewer truck miles traveled and fewer air emissions than aggregate sources in more distant locations.

A total of over thirteen months of "formal" public commenting under CEQA has been conducted for the Project, which is in addition to the over eight months of "formal" public review and comment for the various BLM EIS documents from May 1999 to January 2000.

Following a public hearing process which spanned seven hearing sessions over many months and allowed for public testimony on the Project, the Planning Commission voted to deny the surface mining permit application for the Project.

On March 13, 2000, CEMEX appealed the Planning Commission's action to the Los Angeles County Board of Supervisors ("Board").

On October 17, 2000 the Board extended the AEIDEIR comment period for another 60 days, until December 26, 2000, and continued the hearing process for three months, until January 23, 2001, notwithstanding the fact that no new information was added.

In the minute order for the January 23, 2001 public hearing session, the Board instructed the Planning Staff to close the public hearing with respect to further environmental comments on the CEMEX Application "as described to date," and to prepare a Final EIR and Statement of Overriding Considerations ("SOC")

However, the Board voted to continue the hearing for another three months, until April 24, 2001, after CEMEX expressed its willingness to meet with project opponents, the City of Santa Clarita and community representatives, to discuss possible Project modifications and mitigation measures.

Between January 2001 and April 2001, CEMEX engaged in a series of compromise negotiations with various project opponents, City and community members. These negotiations did not produce a settlement.

On April 24, 2001, the Board conducted the next session of its continued hearing on the Project, at which the Board indicated an "intent to deny" (not approve) the Project, but directed its Planning Staff to report back to the Board at a scheduled June 26, 2001 hearing with a detailed analysis of various Project "mitigation measures" proposed by Project opponents, City and community members. Pursuant to this directive, the Planning Staff requested that CEMEX provide detailed information on these mitigation measures.

Prior to the scheduled June 26, 2001 public hearing, as discussed above, biologists hired by Project opponents (the City of Santa Clarita) located arroyo toad tadpoles on the Project Site. Based on this discovery, CEMEX requested the June 26 hearing to be continued for thirty days to allow the BLM to consult with the Service under the ESA. The County Director of Planning, however, requested a sixty day continuance. At its June 26 public hearing, the Board continued the hearing to August 28, 2001.

On August 7, 2001, an item was placed on the Board's calendar to continue the Project hearing because the federal government had not completed its analysis of the arroyo toad. CEMEX requested to be heard on the item. Following this discussion, the Board determined to continue the hearing until November 27, 2001.

On November 5, 2001, the Planning Staff issued a Report ("November Staff Report") analyzing the conditions and mitigations proposed by the Project opponents, City and community members. The Executive Summary in the November Staff Report contained a statement from County Counsel discussing the legal relationship between the limited County environmental review process and the Federal Government's land-use decision-making process regarding Federal resources.

On November 13, 2001, the County publicly distributed a proposed Final EIR which included a discussion regarding the arroyo toad and the Planning Staff considered this environmental document adequate for certification under CEQA.

During the November 27, 2001 public hearing, the Department of Public Works, for the first time, publicly

articulated concerns relating to the traffic analysis used in the EIR, which analysis had been under review by the County for over three years. Based on this, the Board voted again to continue the public hearing for the Project. A week later, during a December 4, 2001 hearing of the Board, the Board voted to continue the Project.

On December 20, 2001, the County sent a letter to CEMEX informing CEMEX of various concerns the County had regarding the traffic analysis. CEMEX and the County exchanged several letters over the next few months relating to the County's traffic demands.

On January 25, 2002, CEMEX filed the Complaint in this action.

In February 2002, the County DPW prepared a report and "provisional" analysis seeking to apply an alternative traffic methodology ("New DPW Methodology") for the Project's traffic analysis different than the methodology contained in the November 2001 proposed Final EIR (" EIR Traffic Methodology") which previously had been considered adequate by the County Staff including DPW. Under the New DPW Methodology, new potential traffic impacts on Soledad Canyon Road were identified by DPW. Also in February 2002, Planning Staff prepared a report recommending Project denial in light of the DPW report.

On February 25, 2002, the day before the hearing on the Project, CEMEX submitted to the Board a detailed letter responding to the February 2002 DPW and Planning Staff reports, and establishing the validity of the EIR Traffic Methodology, including substantial additional documentation to that effect.

On February 26, 2002, the Board conducted the last session of its public hearing on the Project, and voted 5 to 0 to indicate its intent to deny the Project as reflected in the February 26, 2002 minutes of the Board of Supervisors. Little if any attention was given at the hearing to the new information contained in CEMEX's February 25, 2002 submittal.

As of the February 26, 2002 hearing, there were approximately nineteen continued public hearing sessions on the CEMEX Application before the Regional Planning Commission and the Board of Supervisors, including at least ten public hearing sessions with public comment and/or testimony.

On or about March 8, 2002, the County released Minutes of the Board's February 26, 2002 public hearing, describing the Board's vote to close the public hearing and indicate its intent to deny the applicant's (CEMEX's) appeal and to deny the permit as currently presented to the Board, and instructing County Counsel to prepare findings for denial. Thus, the Board twice, on April 24, 2001 and on February 26, 2002, voted its intent to deny the CEMEX Application following the Regional Planning Commission's vote to deny the CEMEX Application in February 2000.

On April 18, 2002, the County Counsel released its proposed "Findings of the Board of Supervisors and Order – Surface Mining Permit Number 91-165(5)," consisting of some thirty pages of findings, conclusions, and an order for denial of the Federally-Approved Project (collectively, the "Findings").

On April 23, 2002, the Board adopted the Findings and thereafter, the Board released minutes containing the order

formally denying the Project.

Following the County's denial of the Project in April 2002, CEMEX filed a "protective" appeal with the State Mining and Geology Board ("SMGB"), in order to ensure exhaustion of administrative remedies, while asserting in the appeal that the SMGB lacked jurisdiction to hear the appeal due to preemption and other federal issues underlying CEMEX's challenge to the County's denial. Over the County's objections, the SMGB agreed with CEMEX, concluding that the SMGB lacked jurisdiction, and dismissed the protective appeal. In its formal decision issued on May 22, 2002, the SMGB Chairman further concluded that "the public record indicates delay and indecision by Los Angeles County in its processing of this surface mining application. The County's conduct in this area is surprising given the surface mining infrastructure already developed and surface mining history of the mineral lands in question. . ."

D. The Pleadings and the Parties Allegations

1. CEMEX's Allegations

- CEMEX's Complaint seeks declaratory and injunctive relief to prevent the ongoing interference with and frustration of the implementation of the Federally-Approved Project. Alternatively, CEMEX's Complaint seeks damages for violations of CEMEX's constitutional rights.

- CEMEX's Complaint alleges that the County's continued delay, frustration, and ultimate denial of the Federally-Approved Project are preempted by federal law as well as federal decisions determining whether to mine, and the nature, scope and extent

of mining of sand and gravel at the Project Site and implementing these Federal laws and decisions through the Federally-Approved Project. CEMEX's Complaint further alleges that the County engaged in a process designed to result in a "de facto" denial of the Federally-Approved Project through a seemingly endless politically-driven review process before the County, including nearly a decade of environmental review, multiple series of delays, changing and inconsistent environmental review standards, excessive, unreasonable and infeasible proposed Project conditions, and multiple expressions of intent to deny local approval of the Federally-Approved Project.

- CEMEX's Complaint alleges that on April 12, 2002, CEMEX filed its First Amended Complaint following the Board's February 26, 2002 vote of intent to deny the Federally-Approved Project on alleged procedural grounds, identifying CEMEX's filing of this underlying action and CEMEX's so-called "non-cooperation" as precluding the County from completing the environmental review process and thus warranting denial of the Federally-Approved Project.

- CEMEX's Complaint alleges that on May 10, 2002, CEMEX filed its Second Amended Complaint following the Board's adoption of an order to deny the Federally-Approved Project, accompanied by findings supporting the denial that now articulated substantive grounds for the denial (compared to the previous alleged procedural grounds for the vote of intent to deny).

- CEMEX's Complaint alleges that the County improperly sought to circumvent Federal laws and decisions and to frustrate implementation of the Federally-Approved Project by engaging in, under the auspices of the environmental review process, a series of pretextual actions for the purpose of achieving project delays. CEMEX's Complaint alleges that the County further utilized the environmental review process to add an ever-growing number of mitigation measures and conditions to the Federally-Approved Project in an effort to frustrate its implementation. Among them included the imposition of new mitigation measures and conditions that would, if applied, be in direct conflict with the plan of mining operations in the Federally-Approved Project.

- CEMEX's Complaint alleges that the County repeatedly attempted to engage in inappropriate land use decision-making for the Federally-Approved Project, notwithstanding the preemptive effect of federal mining laws and relevant federal approvals, including the ROD approving Federally-Approved Project. CEMEX's Complaint details how the County repeatedly subjected the Project to analysis to consider various alternatives to the Project that would have made implementation of the Federally-Approved Project infeasible, including: the use of "rail-haul" (i.e., transportation of mined sand and gravel from the Project Site by way of a new rail line instead of by truck); as well as reduction in the overall quantity of sand and gravel to be mined and produced (in conflict with the Federal Contracts and ROD which authorize mining and production of 56.1

million tons of production).

- CEMEX's Complaint further alleges that during a November 2001 public hearing on the Federally-Approved Project, the County improperly questioned the validity of the EIR Traffic Methodology, notwithstanding the fact that the EIR Traffic Methodology at that time was known to the County in the EIR for many years and was one of two acceptable traffic methodologies used in the County, and notwithstanding the fact that the Planning Staff and DPW staff had authorized use of the then-existing EIR Traffic Methodology in 1997.

- CEMEX's Complaint details events at that November 2001 public hearing and thereafter demonstrating that further review by the County would be futile and would result in further frustration of the Federal approvals, including allegations that segments of the Board appeared to be exerting political influence over County staff to compel re-examination of traffic impacts, even though this issue was previously analyzed over a period of years. CEMEX's Complaint alleges that this effort was made in order to try to create further delays and as a pretext to impose onerous and anti-competitive project conditions (e.g., rail-haul) that could not be implemented without conflicting with the existing Federal decisions, notwithstanding the fact that the County's own attorneys publicly acknowledged that conditions that frustrated or rendered infeasible the Federal decisions were impermissible.

- CEMEX's Complaint alleges that the Board ultimately denied the Federally-Approved Project on alleged procedural grounds relating to the last minute change in traffic methodology, even though the Board's findings in support of the denial purported to support project denial based on substantive grounds, and even though the Board had voted its intent to deny on February 26, 2002 based on alleged procedural deficiencies absent discussion of the aforementioned substantive issues. CEMEX's Complaint alleges that the County made these substantive findings supporting denial even though no public hearing or other process had been conducted to reach these conclusions.

- CEMEX's Complaint alleges that the County's actions, including delay of hearings on the Federally-Approved Project, excessive environmental review, shifting standards of review, and other conduct, has deprived CEMEX of due process of law as provided by the United States Constitution and in violation of Section 1983 of Title 42 of the United States Code of Laws.

- CEMEX's Complaint alleges that the County and its officers acting under color of law, have sought to impose conditions and requirements on CEMEX and the Federally-Approved Project, and have subjected CEMEX through its review of the Federally-Approved Project to a review process, substantially different from that imposed on similarly situated applicants, thus denying CEMEX equal protection of law in violation of the United States Constitution and Section 1983 of Title 42

of the United States Code of Laws.

- CEMEX's Complaint alleges that pursuant to the requirements of CEQA, the County was required to certify a Final EIR for the County-Approved Project within one-year's time from the date CEMEX submitted a complete application. CEMEX's Complaint alleges that CEMEX (then, TMC), submitted its application for a surface mining permit and reclamation plan in May 1991, but that the County never certified a Final EIR for the Project, in violation of CEQA's one-year requirement.

- CEMEX's further alleges that principles of federal preemption, based on federal law and the federal decisions implementing the Federally-Approved Project, preclude a protracted County environmental review process including with regard to certifying the Final EIR.

- CEMEX's Complaint alleges that the County's actions in delaying and ultimately in denying the Federally-Approved Project, amounted to a violation of the Takings Clause of the United States Constitution by depriving CEMEX of all economically beneficial use of its property interest in the Federal Contracts with the United States and the ROD, including all the conditions, decisions and approvals relating thereto, and that such action further violated Section 1983 of Title 42 of the United States Code of Laws.

- CEMEX's Complaint alleges that the County's actions in delaying and ultimately denying the

Federally-Approved Project amounted to inverse condemnation in violation of the California Constitution, Article 1, Section 9.

- CEMEX's Complaint seeks declaratory and injunctive relief either preempting further County review of the Federally-Approved Project, or alternatively, judgment declaring that the County must issue a surface mining permit and reclamation plan, consistent with the terms and conditions in the Federal Contracts and ROD.

- CEMEX's Complaint seeks damages for violations of due process, equal protection and inverse condemnation, or alternatively, under the Takings Clause of the U.S. Consitution.

2. United States Allegations

- Plaintiff-in-Intervention United States, on behalf of the BLM, intervened as a plaintiff in this action to protect its interests in the Federally-owned sand and gravel mineral materials at the Project Site, as well as its interests in royalty payments from CEMEX, and its interests in the various federal approvals for the Federally-Approved Project.

- In its Complaint-in-Intervention, the United States alleges that the County may impose only limited environmental regulations on the Federally-Approved Project, and that the County may not exercise environmental authority over the Federally-Approved Project in such a manner as to veto the BLM Federally-Approved Project, impose unreasonable restrictions on the Federally-

Approved Project, or indefinitely delay final environmental review of the Federally-Approved Project.

- In its Complaint-in-Intervention, the United States alleges that the County may not lawfully, in the name of environmental regulation, engage in land-use regulation of federally-owned property, including the federal mineral estate on which the Federally-Approved Project is located.

- In its Complaint-in-Intervention, the United States seeks to prevent the County from "further interference" with the Federal Contracts. The United States alleges that by engaging in unreasonable delay in completing its purported environmental review of the Federally-Approved Project, and by denying CEMEX's application for a surface mining permit, the County has effectively blocked the BLM's mineral materials sales to CEMEX, and that the County has also interfered with the BLM's mineral materials sales program by seeking to impose land-use restrictions and other unreasonable conditions on CEMEX' use of the federally-owned mineral estate authorized by the BLM.

- In its Complaint-in-Intervention, the United States alleges that the County's delay and ultimate denial of a surface mining permit stands as an obstacle to the fulfillment of the congressional purposes behind the Materials Act and FLPMA, and thus is preempted by federal law.

- In its Complaint-in-Intervention, the United States seeks declaratory and injunctive relief preempting the County's denial of CEMEX's surface mining permit application, as well as preempting the County's efforts to implement State and local land use policies on the federally-owned mineral estate.

- In its Complaint-in-Intervention, the United States seeks declaratory and injunctive relief preempting the County's unreasonable delay in processing CEMEX's surface mining permit application.

3. County Allegations

- The county alleges that it has not unreasonably delayed this matter, and asserts that the Federal approval process took considerable time to complete, and that CEMEX has acknowledged that large mining projects may take up to ten years to be permitted.

- The County alleges that CEMEX's proposed mining Project was not treated differently from similarly situated projects, that this Project to mine 56 million tons of marketable sand and gravel over a 20 year period is larger in scale than prior County mining projects, and that CEMEX was not intentionally singled out for unequal treatment for impermissible or arbitrary reasons.

- The County alleges that its denial of the CEMEX Application was based in part on Plaintiff's failure to demonstrate that the CEMEX Application met applicable State and County requirements, as well as Plaintiff's failure to cooperate in the

recirculation of the EIR for the Project, as required by CEQA. On January 25, 2002, the applicant initiated litigation in federal court against the County regarding its consideration of the applicant's surface mining permit application. Among other things, the Plaintiff sought injunctive and mandate relief to require the County to certify the FEIR in its present form and to prevent the County from further evaluating the environmental impacts of the CEMEX Application, or from conducting further environmental analysis and/or, from recirculating any additional environmental traffic documentation regarding the CEMEX Application.

- The County alleges that it did not seek to prohibit all mining on the site or reclassify the site's land use designation. Rather, the County alleges it sought to regulate the proposed mining use pursuant to its police powers, as they relate to the application of reasonable environmental and resource-protective measures.

- The County alleges that CEMEX's substantive due process claim fails as a matter of law.

- The County alleges that CEMEX's procedural due process claim is not ripe.

- The County alleges that Plaintiff's causes of action for taking and inverse condemnation are not ripe, and that Plaintiff has no vested property interest in obtaining a land use permit.

IV. FINDINGS, CONCLUSIONS, AND DETERMINATIONS

The Parties hereby stipulate and determine as follows:

A. Federal Preemption

As a matter of law, federal laws and regulations, and federal decisions, have preemptive effect over state law and process when those processes unlawfully conflict with or frustrate the federal decisions. See, e.g., *United States v. Shimer*, 367 U.S. 374, 381 (1961); *see also General Motors v. Abrams*, 897 F.2d 34 (2nd Cir. 1990); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084-87 (9th Cir. 1979). State regulatory process may also be preempted by conflict with federal law. *N.E. Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2001).

For example, a protracted state process may impose such hardship, cost, frustration and uncertainty as to be "sufficient to thwart the federal determination . . . ." *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993).

It is the County's position that BLM's mineral materials sale to CEMEX is subject to the authority of *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 575, 107 S.Ct. 1419, 1422, 94 L.Ed.2d 577 (1987), and that the County is entitled to impose reasonable environmental and resource protective regulation on the Project pursuant to SMARA and CEQA. The United States and CEMEX contend that the County has no land-use authority over the Project, and do not concede that the preemption analysis of *Granite Rock* applies to BLM mineral materials sales. The United States and CEMEX enter into this Consent Decree without waiving the right to argue, in any subsequent litigation

involving the Project (including this Consent Decree), alternative theories concerning whether the state has authority to regulate BLM's performance of a federal function in relation to BLM-administered lands (including federally owned mineral estates) under the Materials Act of 1947.

It is unnecessary for the Court to decide whether the preemption analysis of *Granite Rock* applies to this case, because all Parties agree that, at a minimum, any County regulation of the Project that goes beyond the imposition of reasonable environmental conditions in a timely manner thereon is preempted by federal law under any applicable standard. Because the Court finds that the County has exceeded its alleged authority in this regard, the Court determines that the County is preempted from further regulation of the Project except as outlined in this Consent Decree.

Notwithstanding the preemptive effect of federal laws and decisions on the County's ability to frustrate the Federally-Approved Project, in the interest of a quick resolution of this action, CEMEX has agreed through this Consent Decree, to the imposition of various conditions on the Federally-Approved Project. These conditions have been agreed to by the Parties.

On multiple occasions before 1996, the County was invited to join with BLM to conduct a coordinated federal-state environmental review, and the County declined all such invitations. In this case, the County has already conducted lengthy review of the Project pursuant to the requirements of CEQA and SMARA that has acted as a supplement to the environmental review of the Federally-Approved Project already conducted and concluded by the BLM pursuant to NEPA. There have been over thirteen

months of public review and comment on the Project, and nineteen County public hearing sessions on the Project. The County's environmental review has spanned a decade, including an EIR process that generated a 2000+ page, eight-volume proposed Final EIR, no less than two public circulations for comment of different iterations of the EIR, substantial delay, and extraordinary costs for CEMEX, all in addition to the United States' approved Final EIS issued in June 2000.

CEMEX and the United States assert that this review process by the County, including the extensive public review and numerous public hearings, already far exceeds what is reasonable environmental regulation in the context of the Federally-Approved Project. CEMEX and the United States assert, and the Court agrees, that the review process conducted by the County to date, which includes three County government denials of CEMEX's SMARA permit application,[6] amounts to unreasonable state environmental regulation of a federal project that is preempted by federal law. At a minimum, all Parties, including the County, acknowledge that further environmental review by the County, above and beyond that already conducted, would exceed reasonable environmental regulation and thus would be preempted. Accordingly, the Court finds that further County environmental process, including substitution of the EIR Traffic Methodology with a wholly different New DPW Methodology, and further public recirculation of the proposed

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[6] The three denials occurred on the following dates: (1) in December 1999, the Regional Planning Commission voted its intent to deny the Project, and adopted findings in support of denial in February 2000; (2) on April 24, 2001, the Board voted its "'intent to deny' (not approve)" the Project; and (3) on February 26, 2002, the Board voted its intent to deny the Project, and adopted findings in support of denial on April 23, 2002.

Final EIR, would "thwart the federal determination" and is preempted. *See Sayles Hydro Associates, supra*, 985 F.2d 452 (9th Cir.).

Notwithstanding this finding of preemption, CEMEX and the Untied States agree that the County may complete the CEQA EIR process under the conditions and limitations set forth below. The Parties acknowledge that CEQA generally requires a lead agency to balance the economic, legal, social, technological, or other benefits of a project against its unavoidable environmental risks when determining whether to approve the project, and if such benefits outweigh the adverse environmental effects, then adverse environmental effects may be considered acceptable and the agency may adopt a Statement of Overriding Considerations. (Public Resources Code § 21081, subd. (b); California Code of Regulations, Title 14, §§ 15021, subd. (d), 15093, subd. (a)).

CEMEX and the Untied States assert that a Statement of Overriding Considerations is only relevant where a lead agency exercises discretionary authority to approve or deny a proposed project. CEMEX and the United States assert that no Statement of Overriding Considerations is required of the County because it lacks discretion to approve or deny the Project, and only acts in accordance with Federal-state comity principles to impose reasonable environmental regulations, beyond which all County regulation of the Project is preempted by federal law.

B. Adequacy Of Environmental Review

CEQA requires that local agencies such as the County prepare environmental documentation evaluating potential environmental impacts of projects and identify feasible measures to mitigate such impacts. (Public Resources Code

§§ 21002, 21100).

CEQA requires that local agencies circulate a Draft EIR for public comment, and that the local agency prepare responses to the comments prior to the EIR being certified as adequate under CEQA. (Public Resources Code § 21091).

The County has prepared an EIR that identifies potential environmental impacts of the Project, and identifies numerous measures to mitigate potential environmental impacts. The County has prepared a Draft EIR and has circulated the Draft EIR for public review and comment. The County has prepared responses to the public comments on the Draft EIR. The County has also prepared an AEIDEIR with additional information to supplement the Draft EIR, and has also circulated the AEIDEIR for public review and comment. The County has prepared responses to the public comments to the AEIDEIR.

A local agency such as the County must complete the EIR process within one year of the time the agency accepts the project application as compete, subject to certain exceptions. Cal. Pub. Res. Code § 21151.5; *Sunset Drive Corp. v. City of Redlands*, 73 Cal.App. 4th 215 (1999). An agency that has missed this deadline may be compelled to act by writ of mandate. *Sunset Drive*, 73 Cal.App. 4th at 223. This includes compelling the County to complete the EIR process. *See id.*, at 222. CEMEX submitted its application for a surface mining permit to the County in 1991. As alleged by CEMEX in its Complaint, and without conceding the applicability of CEQA to the Federally-Approved Project, under the *Sunset Drive* case, the Parties agree that the County has exceeded the one-year limit, and is compelled to complete the CEQA process by certifying the Final EIR absent any further review or recirculation.

Notwithstanding that the one year time limit under CEQA has been exceeded, the environmental review by the County, and in particular as it relates to traffic impacts, is adequate under CEQA. In November 2001, the Planning Staff prepared a Staff Report recommending that the proposed Final EIR, which was made available for public review prior to the November 27, 2001 public hearing on the Project, was legally adequate under, and was suitable for certification pursuant to, the requirements of CEQA.

At the November 27, 2001 public hearing, the County DPW testifies that the November 2001 proposed Final EIR was inadequate due to the traffic impact analysis contained therein. Based on this testimony, the Board continued the hearing on the Project. As alleged in its Complaint, CEMEX asserts that this testimony was both pretextual and politically driven and that there were no inadequacies with the EIR Traffic Methodology in the November 2001 proposed Final EIR, and the proposed Final EIR was and remains legally adequate for certification under CEQA.

Thereafter, in February 2002, DPW issued a "provisional" traffic report using the New DPW Methodology rather than the EIR Traffic Methodology, and based upon the New DPW Methodology, concluded that there were potentially significant traffic impacts from the Project not previously identified in the November 2001 proposed Final EIR, which would require that the proposed Final EIR be recirculated again for additional public comment under CEQA.

On February 25, 2002, CEMEX submitted a substantial amount of documentation establishing the validity of the EIR Traffic Methodology. Included in the information provided by CEMEX was documentation of the chronology of written communications between CEMEX and DPW from October

1997 through February 1999 discussing the EIR Traffic Methodology, dated October 30, 1997, November 13, 1997, December 31, 1997, February 4, 1998, February 24 1998, March 24, 1998, May 7, 1998, August 5, 1998, August 26, 1998, October 14, 1998 and February 2, 1999. CEMEX's February 25, 2002 letter further detailed that the EIR Traffic Methodology in the proposed Final EIR is more reflective of the actual "real world" conditions on the relevant roadway (Soledad Canyon Road) than the New DPW Methodology asserted by the County.

The next morning on February 26, 2002, notwithstanding this documentation submitted by CEMEX, the Board voted its intent to deny the Federally-Approved Project in part due to the dispute over the alleged adequacy of the EIR Traffic Methodology. On April 23, 2002, the Board adopted findings in support of project denial, including adoption of numerous findings regarding the inadequacy of the EIR Traffic Methodology.

Having had the opportunity to further review the February 25, 2002 documentation submitted by CEMEX, the written correspondence between DPW and CEMEX, and other historical documentation compiled during the County's preparation of the administrative record in this case, as well as the allegations and claims made by CEMEX and the United States in this case, the County hereby reconsiders its prior findings and determinations regarding the adequacy of the EIR Traffic Methodology, and concludes that the EIR Traffic Methodology is valid. The County further concludes that the New DPW Methodology is also valid but that the New DPW Methodology is more conservative than the EIR Traffic Methodology, and is not necessary in light of the adequacy of the EIR Traffic Methodology.

Having made such a determination, the County further determines that the traffic analysis in the November 2001 proposed Final EIR, including the identification of mitigations in the proposed Final EIR, are adequate, and therefore the proposed Final EIR does not require further recirculation for public comment under CEQA.

In light of the foregoing, and notwithstanding the contention of CEMEX and the United States that federal preemption limits the applicability of the State and local environmental regulations to the Federally-Approved Project, the County acknowledges that, based upon its environmental review of the Federally-Approved Project, including the years of public comment and input, as well as the preparation of the environmental documents, findings and entitlements incorporated into this Consent Decree, the environmental impacts of the Federally-Approved Project have been adequately analyzed pursuant to the requirements of CEQA and local regulations.

Having reconsidered the adequacy of the EIR Traffic Methodology and the November 2001 proposed Final EIR, the County has further reconsidered the bases for denial of the Federally-Approved Project and hereby rescinds (and will take any further action required to formally accomplish this rescission) the following County actions that followed and flowed from the now revoked determination of inadequacy of traffic analysis:

a. the February 26, 2002 vote of intent to deny the Federally-Approved Project;

b. the April 23, 2002 findings and order supporting Federally-Approved Project denial.

C. Public Hearing Process

CEQA does not require hearings. *See* 14 C.C. R. § 15087, subd. (i) (no public hearing required for Draft EIR); 14 C.C.R. § 15089 (no requirement for review of Final EIR). The parties thus agree that the County is not required to hold public hearings pursuant to CEQA.

The Surface Mining and Reclamation Act ("SMARA"), only requires one public hearing: "[ever]y lead agency shall adopt ordinances in accordance with state policy which establish procedures for the review and approval of reclamation plans . . . [t]he ordinances shall establish procedures requiring at least one public hearing . . ." Pub. Res. Code § 2774(a). The County has already had approximately nineteen continued public hearing sessions on the Project, both before the Regional Planning Commission, and before the Board, including at least ten public hearing sessions with public comment and/or testimony, giving the County ample opportunity to hear the public's concerns with, comments on, and opposition/support for, the Project.

CEMEX and the United States contend that due process principles do not require public hearings in this case because the land use authorization for the Federally-Approved Project has already been conferred and determined by the United States through the BLM in the ROD approving the Project. Moreover, to the extent due process principles arguably require public hearings, CEMEX and the United States contend that further state and local procedural requirements may be foregone in the context of consent decrees where such procedural requirements have been identified as sources of impermissible conflict with federal law and decisions.

The Parties stipulate and the Court finds that, to the extent that any process is due, the considerable process already conducted before the County satisfies any such requirements. There have already been approximately nineteen continued public hearing sessions before the County (over and above the hearings before the BLM) for the Project, and for at least ten such public hearing sessions, members of the public were able to express any concerns and provide whatever information they wished to the County. Thus, there has been ample opportunity for public participation under any applicable statues.

NOW, THEREFORE, SUBJECT TO FINAL APPROVAL OF THE COURT, THE PARTIES AGREE AS FOLLOWS:

V. PARAMETERS OF PROJECT TO BE APPROVED BY THE COUNTY

A. Federal Land Use and Environmental Decision-Making

The BLM has engaged in a series of land use decisions which frame the scope of the Federally-Approved Project implementing the provisions and objectives of federal law relating to mining and the use of the public lands, as specifically set forth in the Materials Act and FLPMA, and in implementing regulations. These various federal decisions, as well as related federal decision-making (most notably by the U.S. Fish and Wildlife Service) establish the framework for the Project which cannot be interfered with or otherwise frustrated by County review and requirements. In accordance with this principle, the Parties incorporate herein by reference the following decisions and documents issued during the federal land use and environmental review of the Project:

- 1989 Environmental Assessment for the Notice of Sand and Gravel Sales;

- Federal Contracts for the Sales of Units of Materials, Contract Numbers CA-20139 and CA-22901 (attached as **Exhibit A** hereto)

- 1998 Biological Opinion (incorporated herein);

- August 1, 2000 Record of Decision (also attached as **Exhibit B** hereto);

- June 2000 Final EIS, and all technical documents referenced therein (incorporated herein);

- 2001 Biological Opinion (incorporated herein);

- January 8, 2002 Interior Board of Land Appeals Order Affirming ROD (attached as **Exhibit C**).

These documents establish the parameters of the Federally-Approved Project, and the terms, conditions, analyses, requirements and conclusions contained in these documents control over any unlawfully conflicting or inconsistent State or local provisions or requirements. In the event that either of the aforementioned Biological Opinions becomes the subject of a successful court challenge, and, as a consequence, either Biological Opinion is invalidated, the validity of this Consent Decree shall not be affected, despite the fact that the mining activity contemplated by the Federally-Approved Project may be suspended temporarily pending reinitiation of consultation with the U.S. Fish and Wildlife Service by the BLM, and the receipt of a successor Biological Opinion.

B. CEQA Environmental Documentation and Review

1. The County Will Certify the November 2001 EIR Without Further Public Review or Comment

As determined herein, the County acknowledges that the EIR Traffic Methodology employed in the November 2001 proposed Final EIR is adequate under CEQA for analysis of the County-Approved Project's traffic impacts, irrespective of whether the methodology set forth in the County's February 2002 provisional traffic study New DPW Methodology might also be valid, and the County expressly revokes any statements or other representations to the contrary.

The County also agrees that the traffic mitigations in the November 2001 proposed Final EIR are adequate under CEQA and mitigate impacts to less than significant levels under CEQA; and, the County expressly revokes any statements or other representations to the contrary.

Because the Parties agree herein that the EIR Traffic Methodology as set forth in the November 2001 proposed Final EIR is adequate pursuant to CEQA and the County's own traffic guidelines, there is no "new" information relating to the County-Approved Project that warrants further environmental review or analysis by the County. Under CEQA, further public notice and review for additional comments, also known as "recirculation", is directed where a lead agency adds "significant new information" to an EIR. Cal. Pub. Resources Code, § 21092.1. The Parties hereby agree that no significant new information has been added to the November 2001 proposed Final EIR or otherwise identified and thus no further public review or commenting is

required. The Parties hereby further stipulate that, without conceding the applicability of CEQA to the Project, the County has met all hearing requirements of CEQA, as CEQA has no public hearing requirement. *See* California Code of Regulations, Title 14, §§ 15087, subd.(i) and 15089.

Additionally, the Parties further agree that even if there were significant new information added to the November 2001 proposed Final EIR, that further environmental review and delays would be precluded under federal preemption, as well as under the requirements of CEQA. The Parties agree, and the Court finds, that further public review and recirculation of the EIR would conflict with and frustrate the implementation of the Project, which has already been significantly delayed, and would thus be preempted by the federal laws relating to mining and the federal decisions in place implementing those laws (discussed above), and the County expressly revokes any statements to the contrary.

The Parties agree that recirculation is not substantively required, and also, recirculation is precluded by the timing provisions of CEQA, including Public Resources Code § 21151.5 and the *Sunset Drive* case. The County expressly revokes any previous statement to the contrary.

Based on the County's express acknowledgement herein of the adequacy of the existing EIR Traffic Methodology in the November 2001 proposed Final EIR, the preemptive effect of federal laws and decisions over protracted and unwarranted County process, and CEQA's own requirements for certification, the Parties agree that the County will certify a Final EIR for the County-Approved Project (defined herein), consisting of the November 2001 proposed Final EIR, including incorporation of the mitigation measures identified in the January 2004 Proposed MMRP. These mitigation

measures are detailed in **Exhibit D** attached hereto and incorporated into the terms of this Consent Decree. Although not required by CEQA, additional Project Conditions addressing traffic impacts are further detailed in **Exhibit H** attached hereto and incorporated into the terms of the Consent Decree.

The County will certify the Final EIR within sixty (60) days of entry of this Consent Decree by the Court as a regular agenda item during a regularly scheduled meeting of the Board.

2. The County Will Prepare and Adopt CEQA Findings

As part of the completion of the CEQA process, the Parties agree that the County will complete and issue Findings, in the form attached hereto as **Exhibit E** under CEQA ("CEQA Finding"), detailing the County's environmental determinations relating to the County-Approved Project.

The CEQA Findings will discuss the County's extensive environmental review of the Federally-Approved Project which spanned ten years, the over thirteen months of public review, and the approximately nineteen continued public hearing sessions, including at least ten public hearing sessions with public comment and/or testimony. The CEQA Findings will discuss how the County has complied with the requirements of CEQA and SMARA through this process, and how it has identified a range of reasonable environmental conditions for the Federally-Approval Project in accordance with the Federal approvals.

In accordance with this acknowledgment, the CEQA Findings will detail that the traffic methodology utilized in the

November 2001 proposed Final EIR is adequate for the County-Approved Project. The CEQA Findings will include a traffic discussion that would: (i) clarify that the methodology in the November 2001 proposed Final EIR traffic analysis is valid, irrespective of whether the methodology set forth in the County's February 2002 provisional traffic study might also be valid, and that although the February 2002 methodology is more conservative, it is not necessary given the adequacy of the EIR Traffic methodology; and (ii) the mitigations in the November 2001 proposed Final EIR are adequate under CEQA, and further that additional Project Conditions imposed on the Project as a compromise of litigation through the Consent Decree process further address Project impacts.

The CEQA Findings will include a discussion regarding the arroyo toad, addressing: (i) why there is no significant impact to the arroyo toad; (ii) the additional measures included in the Project pursuant to the 2001 Biological Opinion; (iii) that no additional information regarding the arroyo toad, other than what was in the November 2001 EIR is required for the Project; and (iv) County Planning Staff's conclusion in the November 2001 Staff Report that recirculation of the EIR was not required based on the discovery of arroyo toad tadpoles in the Santa Clara River in May 2002. CEQA Findings in the form attached hereto as **Exhibit E** will be adopted as a regular agenda item at the same time the Board certifies the Final EIR.

3. The County Will Prepare and Adopt a Statement of Overriding Considerations

The United States asserts that the federal project is not governed by CEQA. CEMEX and the United States assert that there is no legal requirement for the County to prepare a

Statement of Overriding Considerations ("SOC) for the County-Approved Project because an SOC is a land use decision-making document, and is thus not applicable where the County exercises no land use decision-making powers. Notwithstanding the issue of whether an SOC is required for the County-Approved Project, in the interests of settlement, the Parties agree that an SOC would be adopted, in the form attached hereto as **Exhibit F**, consistent with principles of federal preemption, the federal laws applicable to the Project and BLM decisions issued pursuant to those laws, the recitals, stipulations, findings, and determinations contained within this Consent Decree, as well as the Court's injunction issued herein. Neither CEMEX nor the United States waives any rights to assert that the SOC is gratuitous and of no legal effect in the event of a subsequent legal challenge by a third party.

The SOC shall detail the preemptive effect of federal law relating to mining, including but not limited to the Materials Act, FLPMA, and regulations implementing those statutes, as well as the preemptive effect of the various decisions made by the BLM relating to the sale of mineral materials at the Project Site, as well as the various determinations relating to CEMEX's Project, including the ultimate decision to approve the Federally-Approved Project in the August 2000 ROD, as upheld in the IBLA's January 8, 2002 decision. The SOC would identify these federal laws and decisions as overriding legal considerations supporting the County's approval of the County-Approved Project.

The SOC will discuss the series of BLM and related federal decisions relating to mining of the Project Site as set forth and discussed above in this Consent Decree, culminating in the August 2000 ROD, and detail how these decisions have a preemptive effect on the County's ability to deny the

Federally-Approved Project.

The SOC will further discuss the series of BLM decisions and indicate that these decisions preempt the County from engaging in excessive delays in approving the Federally-Approved Project, and from imposing on the Federally-Approved Project conditions or other requirements that would conflict with, or frustrate implementation of the Federally-Approved Project.

The SOC will discuss the environmental analysis conducted by the BLM pursuant to NEPA, as well as the host of mitigation measures and other requirements imposed on the Federally-Approved Project by the BLM to minimize environmental impacts, and discuss how, in the context of federal preemption, the County is limited to supplementing these mitigation measures and requirements with reasonable environmental conditions. The SOC in the form attached hereto as **Exhibit F** will be adopted as a regular agenda item at the same time the Board certifies the Final EIR.

C. The County Will Issue All Required Entitlements For The County-Approved Project

In addition to completing its environmental review of the County-Approved Project under CEQA, the County will issue all relevant entitlements and permits for the County-Approved Project.

The Parties agree that there are no further public hearing requirements relating to any of the entitlements or permits to be approved for the County-Approved Project by the County. SMARA only requires one public hearing. Cal. Pub. Resources Code § 2774(a). The Parties stipulate that no

further SMARA or other entitlement hearings are required for the County-Approved Project. The following entitlement documents, in the forms attached hereto, will be approved for the County-Approved Project as a regular agenda item on the Board's agenda within sixty (60) days of the Court's entry of this Consent Decree.

1. Surface Mining Permit and Project Findings

The County will issue Findings and Order, in the form attached hereto as **Exhibit G**, detailing the County's determinations of compliance with County requirements relating to the County-Approved Project ("Project Findings"), which combined with Project Conditions, as referenced herein, shall comprise the Surface Mining Permit for the County-Approved Project. The County-Approved Project shall consist of the following:

- The Federally-Approved Project as analyzed by the BLM in the Final EIS published in June 2000, and as approved by the BLM in the August 2000 ROD;

- The environmental mitigation measures identified in the County's January 2004 Proposed MMRP; and

- The Project Conditions as negotiated between the parties and approved by the Board on April 22, 2003. Attached hereto as **Exhibit H** are the Project Conditions agreed to by the parties during the course of the settlement negotiations. These Project Conditions represent additional Project requirements above and beyond the environmental

mitigation measures for the County-Approved Project included as part of the County's review pursuant to CEQA, and have been agreed to by CEMEX and the United States in an effort to avoid expenses and undue delay on implementation of the Federally-Approved Project.

2. Reclamation Plan

The County will approve a Reclamation Plan for the County-Approved Project as required by SMARA and the County of Los Angeles Code, in the form attached hereto as **Exhibit 1**,[7] and shall consist of the following documents already on file with and previously reviewed by the County:

- PROJECT DESCRIPTION
  Revised Final Environmental Impact Report, Volume 1 – Responses to Comments, Soledad Canyon Sand and Gravel Mining Project, November 2001, Selected text, pages 2-81 through 2-110;

- REVEGETATION SPECIFICATIONS
  Additional Environmental Information to the Environmental Impact Report ("AEIDEIR"), August 2000, Soledad Canyon Sand and Gravel Mining Project, August 2000, Selected text: pages 2-28 to 2-39;

---

[7] The attached October 29, 2003 proposed Mining and Reclamation Plan is prepared pursuant to both Federal and SMARA reclamation requirements. For purposes of County compliance with SMARA, this document is considered a "reclamation plan" only and is referred to here and elsewhere as the proposed Reclamation Plan.

- ADDENDUM TO THE MINING AND RECLAMATION PLAN
  Soledad Canyon Sand and Gravel Mining Project, June 2000, Attachment 1: Slope Stability Evaluation, Hilltop Geotechnical, Inc., June 28, 1998;

- MINING AND RECLAMATION PLAN
  Transit Mixed Concrete Company, Soledad Canyon Sand and Gravel Mining Project, June 1997, Selected text: pages 1 through 61, Appendix G: Performance and Reclamation Bond, Appendix H: LACO Mining and Reclamation Plan Review Comments, and Selected Figures;

- MITIGATION MONITORING AND REPORTING PROGRAM
  Revised Final Environmental Impact Report, Soledad Canyon Sand and Gravel Mining project, January 2004;

- CONDITIONS
  CEMEX Soledad Canyon Project Conditions;

- SUPPORTING STUDIES FOR MITIGATED MINING CUTS MITIGATION
  Final Environmental Impact Report, Volume 6, Technical Appendices, Appendix L, April 2001, Slope Stability Review, Hilltop Geotechnical, Inc., March 23, 2001; Addendum to the Drainage Concept, West Coast Environmental and Engineering, March 23, 2001; and

- FINAL RECLAMATION PLAN FIGURE, EXHIBIT A
  Daniel J. Pellow Consulting, October 16, 2003.

3. Financial Assurances

The County will approve financial assurances for the County-Approved Project consistent with the Reclamation Plan, and the draft Financial Assurances Cost Estimate, in the form attached hereto as **Exhibit J**.

VI. INJUNCTIVE RELIEF

IN ACCORDANCE WITH THE ABOVE PROVISIONS, THE FOLLOWING INJUNCTIVE RELIEF IS HEREBY ISSUED:

The County is enjoined from taking any actions conflicting with the provisions set forth in this Consent Decree, and is enjoined to comply with all provisions, terms, requirements, and obligations set forth in this Consent Decree. The County is further enjoined from further delaying, frustrating or otherwise interfering with the implementation of the Federally-Approved Project, including through delays in approving the County-Approved Project.

The County is ordered to complete the environmental review process pursuant to the provisions of CEQA and as mandated in this Consent Decree, including certification of a Final EIR for the County-Approved Project in the form of the November 2001 proposed Final EIR, adoption of the Mitigation Monitoring and Reporting Program, in the forms attached hereto as **Exhibits D**, and issuance of CEQA Findings and an SOC, in the forms attached hereto as **Exhibits E and F**, within sixty (60) days from the date of entry of this Consent Decree. County is enjoined from conducting further environmental review for the County-Approved Project prior to issuance of its approval.

The County is ordered to issue Project Findings, a Surface Mining Permit, and Reclamation Plan in the forms attached hereto as **Exhibits G, H, and J** and incorporating the terms of **Exhibit H**, and Financial Assurances Cost Estimate in the Form attached hereto as **Exhibit J** to CEMEX, utilizing the process mandated by this Consent Decree, within sixty (60) days from the date of entry of this Consent Decree.

County is enjoined from taking any actions that interfere with, conflict with, or otherwise frustrate or impair the terms of this Consent Decree, and will take no action to contradict the findings or determinations herein. The County is further enjoined from taking any actions which seek to impair the implementation of this Consent Decree, or that interfere with CEMEX's or the United States' interests relating to the County-Approved Project or the Project Site.

The County is enjoined from taking any actions which affect the rights or interests of CEMEX or the United States relating to the County-Approved Project or Project Site, before any other body, agency or official.

THE PARTIES HEREBY CONSENT AND SEEK ENTRY OF THIS CONSENT DECREE AS AN ORDER OF THIS COURT

APPROVED AS TO FORM

DATED: 02-19-04

FOR PLAINTIFF
CEMEX, INC.:

JEFFER, MANGELS,
BUTLER & MARMARO LLP

By: /s/ Kerry Shapiro
Kerry Shapiro
Attorneys for Plaintiff
CEMEX, Inc., a
Louisiana corporation

DATED: FEB 03 2004

CEMEX, INC.

By: /s/ Leslie A. White

Its: _____

COUNTY OF LOS ANGELES

By: /s/ Don Knabe
Chairman, Board of
Supervisors

ATTEST:
VIOLET VARONA-LUKENS
Executive Officer/Clerk of the
Board of Supervisors

By: /s/ Angie maS [Montes]
Deputy

APPROVED AS TO FORM
BY COUNTY COUNSEL

LLOYD W. PELLMAN

By: /s/ Richard D. Weiss
Deputy

APPROVED AS TO FORM
BY FOX & SOHAGI

By: /s/ Deborah J. Fox 2/4/04
Deborah J. Fox

ADOPTED

BOARD OF SUPERVISORS
COUNTY OF LOS ANGELES
FEB 03 2004
/s/ Violet Varona-Lukens
Violet Varona-Lukens
Executive Officer

I hereby certify that pursuant to Section 25103 of the Government Code, delivery of this document has been made.

Violet Varona-Lukens
Executive Officer
Clerk of the Board of Supervisors

By: /s/ Angie maS [Montes]
Deputy

DATED: 02-11-2004

FOR UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

By: /s/ Edward S. Geldermann

UNITED STATES OF AMERICA

By: _____

Its: _____

IT IS SO ORDERED:

DATED: May 3, 2004

DICKRAN TEVRIZIAN
JUDGE OF THE UNITED STATES DISTRICT COURT

[EXHIBITS A THROUGH J ARE NOT INCLUDED WITH THE CONSENT DECREE]

C-85

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
CLERK, U.S. DISTRICT COURT
MAY- 5 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ (initials) DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
MAY - 3 2004
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Priority	√
Send	√
Enter	√
Closed	
JS-5/JS-6	√
JS-2/JS-3	
Scan Only	

CEMEX, INC., a Louisiana Corporation,
Plaintiff,

vs.

COUNTY OF LOS ANGELES, and DOES 1 through 10, Inclusive,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff-in-Intervention.

CITY OF SANTA CLARITA,
Defendant-in-Intervention.

CASE NO. CV-02-747 DT (FMOx)

ORDER **GRANTING** CEMEX'S REQUEST FOR JUDICIAL NOTICE AND **GRANTING** MOTION FOR ENTRY OF CONSENT DECREE

I. Background

A. Factual Summary

Plaintiff CEMEX, Inc. ("Plaintiff" or "CEMEX") brings this action against the County of Los Angeles ("County") for declaratory and injunctive relief, writ of mandate, and damages related to the implementation of a federally funded mining project located in the Soledad Canyon area of Los Angeles County. Plaintiff asserts the following claims for relief in its Second Amended Complaint ("SAC"): (1) Declaratory and Injunctive Relief – Federal Preemption; (2) Declaratory Relief – Federal Preemption; (3) Violation of Procedural Due Process; (4) Violation of Substantive Due Process; (5) Violation of the Equal Protection Clause; (6) Writ of Mandate; (7) Damages – Violation of the Taking Clause; (8) Just Compensation – Inverse Condemnation; (9) Writ of Administrative Mandamus.

The "Stipulated Factual Background," as contained in the Consent Decree, is the basis of the Consent Decree and is adopted by this Court and incorporated by reference herein as the Factual Summary of this Case and this Order.[1] (*See*

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[1] The Stipulated Factual Background contains the "Project Overview," the "Federal Environmental Review of the Project," the "County Environmental Review of the Project," and the "Pleadings and the Parties Allegations."

Decree, p. 25-43.)

B. Procedural Summary

On January 25, 2002, Plaintiff filed a Complaint for Declaratory and Injunctive Relieve, Writ of Mandate, and Damages.

On January 25, 2002, Plaintiff also filed a Notice of Related Cases re: (1) *United States of America v. Canyon County Enterprises, Inc.* (dba Curtis Sand and Gravel, et al.), Case No. CV 86-535 DT (JRx), and (2) *United States of America v. Canyon County Enterprises, Inc.*, et al., Case No. CV-97-0168 DT (ANx).

On February 25, 2002, the City filed a Motion to Intervene.

On February 25, 2002, this Court (Snyder) filed an Order for Ex Parte Application to Shorten Time for hearing on the City's Motion to Intervene, which was thereby set for March 25, 2002, at 10:00 a.m.

On March 1, 2002, the Matter was Transferred to this Court (Tevrizian) pursuant to General Order 224 as a Related Case.

On March 25, 2002, this Court filed an Order denying City of Santa Clarita's Motion to Intervene, which was thereafter entered on March 26, 2002.

On March 28, 2002, Plaintiff filed a Notice of Entry of Order Denying City of Santa Clarita's Motion to Intervene.

On April 12, 2002, Plaintiff filed a First Amended

Complaint for Declaratory and Injunctive Relief, Writ of Mandate and Damages.

On May 10, 2002, Plaintiff filed a Request for Preparation of Administrative Record.

On May 10, 2002, Plaintiff filed a Second Amended Complaint for Declaratory and Injunctive Relief, Writ of Mandate and Damages.

On May 28, 2002, the City filed a Renewed Motion to Intervene as a Defendant under Rule 24.

On June 3, 2002, the parties filed a Joint Report re Discovery and Other Matters pursuant to Fed.R.Civ.P. 26(f) and Local Rule 26.

On June 17, 2002, Defendant County of Los Angeles filed a Notice of Motion and Motion to Dismiss the Second Amended Complaint for Failure to State a Claim Upon Which Relief Can be Granted, or in the alternative, Motion to Abstain from the Exercise of Jurisdiction, which this Court granted in part and denied in part of July 29, 2002.

On July 2, 2002, County of Los Angeles filed a Notice of CEQA Settlement Meeting pursuant to California Public resources Code § 21167.8.

On July 8, 2002, the United States, filed an Ex Parte Application of Edward S. Geldermann, as Attorney for the United States, to be Relieved From Local Rule 83.2-3 Requiring Permission to Appear Pro Hac Vice, which was denied on July 10, 2002.

On July 8, 2002, the United States filed an Ex Parte

Application to Excuse Compliance with Local Rule 7-3 and 6-1, 7-9, and 7-10, for leave to file Motion to Intervene, and to schedule a hearing on Motion to Intervene for July 22, 2002, which was denied without prejudice to the bringing of a properly noticed motion on July 10, 2002.

On July 8, 2002, this Court filed an Order Denying City of Santa Clarita's Renewed Motion to Intervene as a Defendant Under Rule 24, which was thereafter entered on July 10, 2002.

On August 5, 2002, the United States of America filed a Notice of Motion and Motion to Intervene as a Plaintiff, which was granted on September 9, 2002.

On August 5, 2002, the City of Santa Clarita filed a Notice of Appeal from an Order denying the City's Renewed Motion to Intervene entered on July 10, 2002.

On August 20, 2002, the County of the Los Angeles filed their Answer to Plaintiff's Second Amended Complaint.

On September 10, 2002, the United States of America filed a Complaint in Intervention for Declaratory and Injunctive Relief.

On October 9, 2002, the County of Los Angeles filed their Answer to United States of America's Complaint In Intervention.

On November 18, 2002, Plaintiff, the United States, and the County of Los Angeles filed a Joint Report Re Discovery Plan and Other Matters pursuant to Federal Rule of Civil Procedure 26(f) and Local Rule 26-1.

On November 25, 2002, this Court held a Scheduling Conference and set the following dates: Discovery Cutoff – August 29, 2003; Summary Judgment Motions – November 24, 2003 at 10:00 a.m. (Pretrial and Trial Settings). This Court further set a hearing on proposed discovery for December 16, 2002 at 10:00 a.m., and instructed the parties to submit separate lists of possible candidates to preside over mediation by December 9, 2002.

On December 3, 2002, the County of Los Angeles submitted its three suggested judges for alternative dispute resolution pursuant to this Court's November 25, 2002 Scheduling Conference instructions. On the same date, Plaintiff and the United States also submitted the names of three suggested judges for alternative dispute resolution.

On December 11, 2002, Plaintiff filed a Report to the Court Re Outstanding Issues Relating to Depositions and Documents, which included Plaintiff's and the United States of America's Preliminary List of Proposed Witnesses for Deposition.

On December 11, 2002, Defendant County of Los Angeles filed a Preliminary List of Potential Deponents. On this same date, County of Los Angeles also filed its Objection to Plaintiffs' Preliminary List of Eight (80) Potential Deponents.

On or about December 11, 2002, the Court selected retired federal judge Layn Phillips to conduct alternate dispute resolution pursuant to Local Rule 16.14 and ordered the parties to conduct 24 hours of mediation.

On December 13, 2002, Defendant County of Los Angeles filed a Response and Objection to Plaintiffs' Report to Court Re Outstanding Issues Relating to Depositions and

Documents.

On December 16, 2002, this Court held a hearing on proposed discovery and ordered the following: Plaintiffs 17 Depositions; Defendant – Statutory Amount of Depositions.

On January 10, 2003, Defendant County of Los Angeles filed a Request for Enlargement of Time to File Jury Trial Demand or, in the Alternative, Request for Relief from Failure to File Jury Trial Demand, which this Court denied on February 3, 2003.

On May 21, 2003, this Court set a Status Conference Re Progress of the Case on June 16, 2003 at 10:00 a.m.

On June 16, 2003, the Status Conference was held and the Court agreed that the EIR need not be recirculated.

On November 3, 2003, oral argument was held before the Ninth Circuit Court of Appeals.

On November 24, 2003, Plaintiff filed a Notice of Entry of Order Pursuant to the Stipulation of Parties Continuing (1) Status Conference from November 24, 2003, to February 23, 2004 at 10:00 a.m.; (2) Discovery Cut-Off from November 28, 2003, to March 31, 2004; (3) Pre-Trial Conference from February 23, 2004, to May 24, 2004 at 1:30 p.m.; (4) Summary Judgment Motions from February 2, 2004, at 10:00 a.m. to April 26, 2004 at 10:00 a.m.

On November 26, 2003, City of Santa Clarita filed a Notice of Motion and Motion for Stay of Proceedings Pending Appeal, which was denied by this Court on January 12, 2004.

On February 11, 2004, a Stipulation and Order filed

Continuing Status Conference until March 15, 2004.

On February 23, 2004, CEMEX filed a Motion for Entry of Consent Decree, which is currently before this Court. On this same date, Defendant County of Los Angeles filed a Joinder in Motion for Entry of Consent Decree. On this same date, Plaintiff-in-Intervenor United States also filed a Joinder in Motion for Entry of Consent Decree.

On February 23, 2004, the County of Los Angeles lodged Ninety-Three (93) Volumes of Administrative Record with this Court.

On February 25, 2004, CEMEX filed a Notice to Court of Ruling by the Ninth Circuit Regarding the Intervention of the City of Santa Clarita as it Pertains to the Motion for Entry of Consent Decree.

On February 26, 2004, an Order was filed granting Ex Parte Application to Continue Hearing Date for CEMEX's Motion for Entry of Consent Decree and Setting Briefing Schedule from March 15, 2004 to May 3, 2004.

On March 9, 2004, Defendant-in-Intervention City of Santa Clarita filed an Answer to Second Amended Complaint.

On March 12, 2004, a Stipulation was filed Continuing Status Conference.

On March 16, 2004, this Court filed an Order Pursuant to the Stipulation of Parties Continuing Status Conference Hearing Date from March 15, 2004 to May 3, 2004.

On March 19, 2004, this Court received the Memorandum Opinion issued by the Ninth Circuit Regarding the

Intervention of the City of Santa Clarita as it Pertains to the Motion for Entry of Consent Decree.

On April 5, 2004, Defendant-in-Intervenor City of Santa Clarita filed a Notice of Motion and Motion for Summary Judgment/Adjudication.

On April 5, 2004, Defendant-in-Intervenor City of Santa Clarita filed an Opposition to Motion for Entry of Consent Decree.

On April 6, 2004, CEMEX filed an Ex Parte Application to Strike or, in the Alternative, Motion to Take Off Calendar Defendant-in-Intervenor City of Santa Clarita's Motion for Summary Judgment. On this same date, Defendant Los Angeles County filed a Joinder in the Ex Parte Application of Plaintiff CEMEX for Motion to Strike or, in the Alternative, Motion to Take Off Calendar Defendant-in-Intervenor City of Santa Clarita's Motion for Summary Judgement.

On April 7, 2004, Defendant United States filed a Joinder in the Ex Parte Application of Plaintiff CEMEX for Motion to Strike or, in the Alternative, Motion to Take Off Calendar Defendant-in-Intervenor City of Santa Clarita's Motion for Summary Judgment.

On April 8, 2004, an Order was filed Granting Ex Parte Application of Plaintiff CEMEX for Motion to Strike or, in the Alternative, Motion to Take Off Calendar Defendant-in-Intervenor City of Santa Clarita's Motion for Summary Judgment.

On April 19, 2004, CEMEX, Plaintiff-in-Intervenor United States, and Defendant County of Los Angeles filed their Replies in Support of Motion for Entry of Consent Decree.

II. Discussion

A. Standards

1. Request for Judicial Notice

A court must take judicial notice if a party requests it and supplies the court with the requisite information. Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). This Court may take judicial notice of facts outside the pleadings without converting the motion to one for summary judgment. *See Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986)(citing *Sears, Roebuck & Co. v. Metropolitan Engravers*, Ltd., 245 F.2d 67, 70 (9th Cir. 1956)).

A court may take judicial notice of "records and reports of administrative bodies." *Mack*, 798 F.2d at 1282 (citing *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953)). In addition, documents whose contents are alleged in a complaint and whose authenticity is not in question may be considered in a motion to dismiss. *See Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994).

This Court may take judicial notice of its own records, and documents that are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (courts may take judicial notice of matters of public record outside the pleadings); *United States*

v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (courts may take judicial notice of their own records).

2. Motion for Entry of Consent Decree

In an attempt to raise the standard for review of a consent decree, the City of Santa Clarita (the "City") cites to *Durrett v. Housing Authority of the City of Providence*, 896 F.2d 600 (1st Cir. 1990). However, the City's heightened standard and interpretation of *Durrett*'s required factors are misplaced and inaccurate. As a general matter, "a district court should enter a proposed consent judgment if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy." *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990); *see also United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). Additionally, where a consent decree may affect the public interest, there is a heightened responsibility on the court to protect that interest, but "the court need not require that the decree by 'in the public's best interest' if it is otherwise reasonable." *Id.* at 581, (*citing SEC v. Randolph*, 736 F.2d 525, 529) (emphasis in original). Ultimately, in approving a consent decree, the "court need only be satisfied that the decree represents a 'reasonable factual and legal determination." *Id.* (*citing United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (per curiam)).

The Supreme Court has defined consent judgments (i.e. consent decrees as follows:

> Consent decree are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate issues involved in the case and thus

> save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

As specifically set forth in the Ninth Circuit Memorandum Opinion in *CEMEX, Inc. v. County of Los Angeles*, 9th Cir. No. 02-56364:

> We note that the District Court may move forward with a consent decree between CEMEX and the County. *See City of Los Angeles*, 288 F.3d at 405. In *City of Los Angeles*, we held that "although this appeal involves intervention decisions made at the outset of the case, our holding [reversing the denial of permissive intervention and intervention of right and remanding] does not require the district court to turn back the clock or rescind the consent decree." 288 F.3d at 404-5. As in the *City of Los Angeles*, "our holding does not require the district court to turn back

> the clock." 288 F.3d at 404. Rather, the City shall be allowed to intervene as of the date of this disposition, and to be treated as an intervenor party from that date forward. *Id.* Thus, the City shall be entitled to be heard concerning the court's approval of any consent decree proposed between the original parties, and to appeal the approval of any such decree, but shall not be entitled to reopen any issues already decided in this case.

B. Analysis

Plaintiff CEMEX, Plaintiff-in-Intervenor United States of America ("United States"), and Defendant County Los Angeles (collectively herein referred to as the "Original Parties") have agreed to settle the litigation *CEMEX, Inc., et. al. v. County of Los Angeles*, U.S.D.C. Case No. CV 02-747 DT (FMOx), in accordance with the terms and conditions of a Consent Decree. By this Motion, the Parties jointly seek this Court's approval of their settlement and the entry of the Consent Decree as a judgment by this Court.

The Consent Decree is the result of an intense and long nine-month vigorously debated court supervised mediation process before the Honorable Layn R. Phillips, retired U.S. District Court judge. The Original Parties have settled their disputes regarding the County's environmental review and permitting of CEMEX's Soledad Canyon Sand and Gravel Mining Project pursuant to CEQA, SMARA and the County Surface Mining Permit Ordinance (County Code § 22.56.1240 *et seq.*) as reflected in the sixty-one (61) page proposed Consent Decree. The Consent Decree also allows the United States to complete its mineral material sale and regulatory

approval process for the Project while accommodating local authority by the County in a manner that does not prejudice the federal mineral sales program, and allows CEMEX finally to move forward with its Project. It is this Court's duty to independently review and scrutinize, if necessary, the terms of the Consent Decree in making sure ample support exists in support for the entry of said Decree.

Defendant-in-Intervention City of Santa Clarita ("City") recently filed an Opposition to Motion for Entry of Consent Decree, which will also be addressed in this Order.

1. CEMEX's Request for Judicial Notice is Granted

CEMEX asks this Court to take judicial notice of the following documents which are attached to the Request of Judicial Notice in Connection with Motion for Entry of Consent Decree, filed February 23, 2004:

Exhibit 1: January 23, 1986 Complaint for Conversion, Trespass, Injunctive Relief and Damages entitled *United States of America v. Canyon County Enterprises, Inc.*, United States District Court, Central District of California No. CV 86-0535 PAR (JRx);

Exhibit 2: Stipulation for Compromise Settlement and Order Thereon in *United States of America v. Canyon County Enterprises, Inc.*, Central District of California Case No. CV 86-535 PAR (JRx) filed June 23, 1988;

Exhibit 3: Notice of Motion for Partial Stay Pending Appeal of Order Denying Vacation of

Dismissal and Enforcement of Settlement Agreement; Memorandum of Points and Authorities; and Declaration of Ben W. Curtis with exhibits dated December 27, 1989 in *United States of America v. Canyon County Enterprises, Inc.*, United States District Court for the Central District of California Case No. CV 86-0535 DT (JRx);

Exhibit 4: A true and correct copy of the Memorandum Opinion issued by the Ninth Circuit in *United States of America v. Canyon County Enterprises, Inc.*, 9th Cir. No. 90-55302;

Exhibit 5: Amended/Agreed to Statement of Uncontroverted Facts and Conclusions of Law in Support of Plaintiff in Intervention and Counterdefendant Transit Mixed Concrete Company's Judgment on Summary Judgment filed November 14, 1997 in *United States of America v. Canyon County Enterprises, Inc.*, Central District of California Case No. CV 97-0168 DT (ANx);

Exhibit 6: Judgment on Summary Judgment in *United States of America v. Canyon County Enterprises, Inc.*, United States District Court for the Central District of California Case No. CV 97-0168 DT (ANx);

Exhibit 7: Amended Order Granting in Part and Denying in Part Motion of Plaintiff-in-Intervention Transit Mixed Concrete for Summary Judgment and Permanent Injunction in *United States of America v. Canyon County*

Enterprises, Inc., United States District Court for the Central District of California Case No. CV 97-0168 DT (ANx).

This Court hereby grants Judicial Notice of these documents as they are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned, bear a direct relation to matters at issue in the present proceedings, and have not been opposed.

3. The Parties Freely Entered Into the Consent Decree

The City contends that one of the factors in approving a consent decree is that the decree must be fair, adequate and reasonable, and the parties must have validly consented to the terms of the decree. *See Durrett*, 896 F.2d at 604. A consent decree is a judgment; it contains elements of a contract and contract principles may be applied to consent decrees. *United States v. ITT Continental Bakery, Co.*, 420 U.S. 223, 236-37 & n.10 (1975). With that, the City astonishingly advances an argument that the County did not freely enter into the Consent Decree and that it has "contract[ed] away public rights under threat of personal embarrassment or other sanction." (Opp., at 45:13-15.) However, contrary to the unsubstantiated allegatiosn of the City, the Consent Decree did not arise as a result of "duress" and "coercion."

The City's allegations fail to address the extensive and contentious meditation process between the Original Parties and ignores the clear record before the Court, contending that "[f]ollowing the denial" of the Federally-Approved Project on April 23, 2002, "the County began secret negotiations with CEMEX and the Federal government to extricate itself from this litigation . . . ." (Opp. At 12:26-27.)

As the Parties are aware, it was during a status conference on December 16, 2002, almost a year into the case, that the Parties were ordered to participate in mediation before the Honorable Layn R. Phillips, retired United States District Court judge. This Court-mandated mediation process spanned nine months, involving all-day sessions on February 13, 2003, March 5, 2003, April 8, 2003, May 19, 2003, an all-weekend session on September 6 and 7, 2003, and October 9, 2003; numerous telephone conferences with Judge Phillips; and countless days of direct negotiation sessions between the Parties. (*See* Declaration of Layn R. Phillips, dated April 19, 2004 ("Phillips Decl.") ¶ 6; *see also* Declaration of Kerry Shapiro in Support of Motion for Entry of Consent Decree, "First Shapiro Decl.," ¶1.)

The Consent Decree was not entered into out of duress. Rather, the negotiations "were conducted in an adversarial, arm's length basis" involving "exchanges of numerous proposals and counter-proposals among counsel[.]" (Phillips Decl., ¶ 10.) As the Court-appointed mediator said himself: "[t]hroughout the course of the negotiations, it became clear to me that each of the parties firmly believed that it was giving up terms and making concessions that it otherwise felt it might be able to obtain through litigation, in the interest of reaching a settlement." (Phillips Decl., ¶ 9.) The City's arguments that the Consent Decree is the result of "closed door, secret negotiations" between CEMEX, the United States, and the County and that because it was denied intervenor status, it was "wrongfully excluded from these back-room negotiations" is completely groundless and unsubstantiated. (Opp., at 1:9-24.) The City does not realize that all mediation sessions are generally confidential, regardless of whether the participating parties are public entities or not. The City erroneously characterizes a Federal Court ordered mediation before a highly-respected neutral moderator as "back-room

negotiations." Nothing could be further from the truth or disparaging to the judicial process or damaging to alternative dispute resolution conducted by experienced well qualified counsel and a respected former federal judicial officer.

Furthermore, the City's argument that "duress conditions" in the proposed Consent Decree directed against the County render it unfit to "police" the project mitigation measures in violation of CEQA and NEPA is without merit. The City is concerned with a portion of the Consent Decree establishing that between April 2003 and October 2003, one or more persons employed by the County engaged in some allegedly wrongful conduct, which is defined in the Decree as "Retroactive Conduct." CEMEX and the Federal Government apparently learned of this Conduct through some undisclosed source, the confidentiality of which they seek to protect. (Decree, p. 15, n.2.) The City contends that although the specifics of this conduct is never detailed, it is apparent that CEMEX and the Federal Government have "something big on" the County and are lording it over the County to extract concessions on the Project.

The City argues that as part of the enforceability provision set forth in the Consent Decree and for a period of up to two years after start-up of the Project, CEMEX or the Federal Government may publish the Retroactive Conduct in a Motion to Dissolve the Decree or other Motion for Contempt for violation of the Consent Decree if they determine that the "Official Policy Makers" (as that term is defined herein)[2] of

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[2] "Official Policy Makers" includes those recognized and defined under the body of case law interpreting 42 U.S.C. § 1983, which the Parties agree include at a minimum the County Supervisors, the County Counsel, Department Heads, the Chief Administrative Officer, and (for purposes of this enforcement provision) Conal McNarnara, Millie Jones

the County "directly or indirectly, engages in or encourages a course of conduct intended to materially delay, frustrate or prevent the timely and successful implementation of the County Approved Project." (Decree, 14:4-6) (hereinafter referred to as the "Duress Provisions"). The City contends that the County's judgment and substantive role in its supervisory function will be impaired and its supervision hamstrung due to these Duress Provisions.

First, as CEMEX argues in its Reply, the City's argument concerning the "enforceability" provisions fails to account for the fact that the County's decision to enter into the Consent Decree is not a result of the enforceability provisions included therein, but rather as a result of the claims raised by CEMEX and the United States relating to federal preemption and other constitutional theories. The enforceability provisions, thus did not "coerce" the County into settling, but rather are merely a result of the Parties negotiations following the decision to settle the lawsuit. The Declaration of Layn R. Phillips, the Court-appointed mediator, lays to rest the unfounded attack that the County only settled because CEMEX and the Federal government had "something big on the County." (Opp. 35:22-23.)

Moreover, the concept of "retroactive conduct" appears to this Court to be nothing more than the creation of a time line beyond which the Parties agree to continue forward in good faith. The Official Policy Makers and non-Official Policy Makers are restricted by the Consent Decree in taking only those actions that would directly lead to violations of the County's obligations under the Consent Decree. It does not provide an independent basis for liability outside the scope of this case, but rather provides a mechanism to return to the

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and Bob Haueter for so long as they remain employed by the County.

litigation. Thus, contrary to the City's unsubstantiated allegations, County officials or employees will not be hamstrung by their inability to distinguish between actions which "directly or indirectly, engage [] in or encourage [] a course of conduct intended to materially delay, frustrate or prevent the timely and successful implementation" of the Project. (Decree, p. 14:4-6; Opp., pp. 36-37.) The Consent Decree specifically requires that the County provide guidance, in the form of "instructions to its Official Policy Makers and to its non-policy making agents and employees who are involved in any non-incidental aspect of the implementation or administration of the [Project] regarding its and their obligations" under the Consent Decree. (Decree, p. 16:3-6.) Further, the County must "republish and distribute such instructions on an annual basis to its Official Policy Makers and to those individuals that have a non-incidental role in the implementation of the [Project] during the period of time during which this Consent Decree is in effect and being implemented." (*Id.*, p. 16:9-13.) Through the instructions and consultation with County Counsel, officials and staff will be adequately guided on carrying out their discretionary functions within the parameters of the settlement of this litigation.

Also contrary to the City's duress assertion is the fact that CEMEX cannot interfere with the County's process by arbitrarily claiming that the County has violated its rights under the Consent Decree. Any party claiming that the Consent Decree has been violated must first tender the matter to the mediator, Judge Phillips, who then must file with this Court a non-binding recommendation whether there has been a breach of the Consent Decree. (Decree, p. 17:6-10.) Any party claiming a breach must also first participate in good faith efforts to resolve the matter prior to any judicial review. (Decree, pp. 17:22-18:24.) Thus, CEMEX will not be able to

unilaterally charge the County with a material breach. Ultimately, the County retains full authority to enforce all Project conditions and environmental mitigation measures and to take lawful action in response to any violation thereof.

4. The City's Federal Preemption Argument Does Not Warrant Denial of the Consent Decree

As a matter of law, federal laws and regulations, and federal decisions, have preemptive effect over state law and process when those processes unlawfully conflict with or frustrate the federal decisions. *See, e.g., United States v. Shimer*, 367 U.S. 374 (1961); *see also General Motors v. Abrams*, 897 F.2d 34 (2nd Cir. 1990); *see also General Motors v. Abrams*, 897 F.2d 34 (2nd Cir. 1990); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084-87 (9th Cir. 1979). State regulatory process may also be preempted by conflict with federal law. *N.E. Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2001). For example, a protracted state process may impose such hardship, cost, frustration and uncertainty as to be "sufficient to thwart the federal determination . . . ." *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (9th Cir. 1993).

It is the County's position that the Bureau of Land Management's ("BLM") mineral materials sale to CEMEX is subject to the authority of *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 575 (1987), and that the County is entitled to impose reasonable environmental and resource protective regulation on the Project pursuant to SMARA and CEQA. The United States and CEMEX contend that the County has no land-use authority over the Project, and do not concede that the preemption analysis of

Granite Rock applies to BLM mineral materials sales.[3] The United States and CEMEX enter into the Consent Decree without waiving the right to argue, in any subsequent litigation involving the Project (including the Consent Decree), alternative theories concerning whether the state has authority to regulate BLM's performance of the federal function in relation to BLM-administered lands (including federally owned mineral estates) under the Materials Act of 1947.

a. The City's First Argument that this Court Does Not Have the Authority to Enter the Proposed Consent Decree is Misplaced

The City's main concern is that the Consent Decree does not allow for full CEQA compliance. Thus, perhaps in an effort to obscure the fact that the County review process does in fact comply with state law, the City contends that this Court does not have the authority to approve the Proposed Consent Decree absent an express finding that any application of CEQA to the Project is preempted. Accordingly, the City demands that all preemption claims be adjudicated in this settlement process.

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[3] The United States and CEMEX believe that there may be differences between the statutes and regulations applicable to the hardrock mining activities at issue in *Granite Rock*, and those governing the United States' proprietary mineral disposition regime involved here, that militate against uncritically applying *Granite Rock's* analysis as the sole basis for preemption in this case. For this reason, the parties, as part of their negotiated settlement, did not specify *Granite Rock* as the controlling legal standard, but simply agreed that the facts of this case, under any legal standard (including *Granite Rock*), would satisfy a finding of preemption at least with respect to any further regulation of the Project by the County, except as outlined in the Consent Decree.

First, given the Administrative Record before the Court and the long history of environmental analysis conducted on this Project, it is this Court's finding that the Consent Decree sets forth a Project that complies with all substantive requirements of CEQA, fully identifies significant environmental effects and feasible mitigations, and which, in fact, provides additional environmental and other benefits to the County as a whole and the City in particular.

Second, the City exaggerates this Court's duties in reviewing the Consent Decree and misstates the preemption issue before this Court. Although principles of Federal preemption underlie the complaints by CEMEX and the United States in this action, the issue in this case, as framed in the pleading, law and motion orders, and the Motion to Enter the Consent Decree is whether further environmental process beyond that already conducted by the County prior to this lawsuit is preempted. The Parties have agreed to stipulate, and this Court independently finds on the basis of the record before it, that only further County review is preempted, because the Consent Decree and its related documents satisfy the requirements of state law, including both CEQA and the California Surface Mining and Reclamation Act ("SMARA"), Pub. Res. Code §§ 2710 *et. seq.* Thus, the Consent Decree establishes the following: (1) the Parties agree the County environmental process to date satisfies state law (CEQA and SMARA); (2) the Parties agree to settle and thus not to resolve whether the County process to date was appropriate or whether it was inappropriate and preempted; and (3) the Parties agree that, whether or not the process to date complies with state law, and whether or not the process to date is preempted, in any event, given the length of County process to date, state law CEQA timing limitations, and other factors, that any future County administrative proceedings are preempted.

As the Parties are aware, this Court has already advised the Parties and hereby agrees with their stipulation based on a complete record before it that further environmental review of the Project by the County is preempted, because it would frustrate the grant of federal mining contracts to CEMEX. This is consistent with the various legal precedents on preemption in the mining field, including, to the extent applicable, *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987).

Accordingly, the City is incorrect in their assertion that this Court does not have the authority to enter this Consent Decree.

5. The Proposed Consent Decree Does Not Violate State and Federal Environmental Laws

It is understood that a consent decree may not authorize parties to take action that would otherwise be unlawful. *See League of United Latin American Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (citations omitted).[4] The City contends that is the case here, as the Consent Decree would allegedly allow the Parties to violate CEQA, NEPA, and Federal Materials Act, the Clean Air Act, the Clean Water Act, the ROD and Federal Contracts at issue in this litigation.

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[4] CEQA's obligations may exceed NEPA's. *City of South Pasadena v. Gold Schmidt*, 637 F.2d 677, 680 n.4 (9th Cir. 1981) (*citing San Francisco Ecology Center v. City and County of San Francisco*, 122 Cal.Rptr 100, 48 Cal.App.3d 584 (1975)). Where NEPA's requirements are procedural only, CEQA's are both procedural and substantive. *City of Carmel-By-The-Sea v. United States Department of Transportation*, 123 F.3d 1142, 1150 (9th Cir. 1997).

a. The Proposed Consent Decree does not violate CEQA or NEPA

According to the City, the procedures employed by the County, as they are memorialized in the Proposed Decree, the Findings, the Mitigation Measures, the Conditions and the Statement of Overriding Consideration ("SOC"), in combination with the future steps outlined in the Decree, do not comply with CEQA and NEPA as a matter of law.

(1) The Consent Decree is not procedurally flawed

First, the City manufactures a claim that procedurally, the Consent Decree is fatally defective because the City was excluded and unable to intervene as a defendant until the 9th Circuit Court of Appeals reversed this Court's denial in February 2004 and allowed for the City to be consulted on this Project. The City now contends that had intervention been granted at the outset, the City would have been "at the table" during the mediation negotiations regarding the Project's size and scope. Instead, the City contends that the Parties negotiated the Project conditions with total disregard to the City's interests. The City has apparently prioritized three specific mitigation measures as essential to the Project: [1] use of imported water, [2] use of railhaul; [3] no reduction of the ridgeline, however, due to its exclusion from the negotiations, the City contends that none of these measures are contained in the now Proposed Consent Decree.

This Court is not persuaded with the City's argument that it was excluded from the process. The record is clear that the City has actively participated throughout the framing, analysis, and development of this Project. In fact, the County encouraged the City's participation as commenting party on

the Project. However, unsatisfied with its role as a commenting party, it appears now that the City has adopted a no-holds barred approach to do whatever is in the City's power to either stop the Project or continue with this never ending review process. This Court will not allow the City to usurp the County's CEQA process simply to stop or further delay the Project.

(2) The Consent Decree is not substantively flawed and the City has failed in its attempts to redefine the proposed project as being significantly different

Second, the City contends that substantively, the Proposed Decree allegedly contains several significant changes to the Project that have not been subject to CEQA and NEPA review. It is the City's position that when a federal agency "makes substantial changes in the proposed action that are relevant to environmental concerns" the agency is required to prepare a Supplemental Environmental Impact Statement (SEIS). 40 C.F.R. § 1502.9 (c)(1)(i). Similarly, the City argues that the County is charged with analyzing any new information that comes to light pursuant to CEQA by acting as an appropriate consenting agency and thereby satisfying the requirements of NEPA. *See, e.g., Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998). CEQA requires recirculation of an EIR which has not been certified only in certain limited situations. Pursuant to CEQA Guidelines § 15088.5, recirculation of an EIR is triggered whenever "significant new information" is added to the EIR prior to its certification. However, the significant new information must change the EIR "in a way that deprives the public of a meaningful opportunity to comment on a substantial adverse

environmental effect of the project or a feasible way to mitigate or avoid such an effect . . . that the project's proponents have declined to implement." CEQA Guidelines § 15088.5(a). The "significant new information" trigger for recirculation reaffirms the goal of meaningful public participation in the CEQA review process, but does not do so with the intent to promote endless rounds of revision and recirculation of EIRs. *Laurel Heights Improvement Association v. Regents of the University of California*, 6 Cal.4th 1112, 1132 (1993). "Recirculation was intended to be an exception, rather than the general rule." *Id.* The California Supreme Court has cautioned that "'[R]ules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement.'" *Id.*, *citing Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 576, 276 Cal.Rptr.2d 410 (1990).

In this regard, the City first urges the Court to find that provisions in the U.S. Fish and Wildlife Service's August 2001 Supplemental Biological Opinion ("SBO") for the Arroyo Toad that allegedly adds five wells to the Project "radically alters the assumptions upon which the federal government approved the Project." (Opp., p. 27:19-20.) Next, the City asserts that the Consent Decree adds a new "project acceleration" provision for the Project that purportedly changes the annual rates of production of sand and gravel that CEMEX is authorized to mine under BLM's contracts, thereby allegedly increasing the annual maximum permissible amount of tonnage authorized to be produced, and allegedly constituting a significant change in the Project requiring updated environmental analysis. (*Id.*, pp. 29-30.) The City also asserts that there is "new information" requiring supplemental analysis to be found in the South Coast Air Quality Management District's ("AQMD") adoption of a new

methodology for quantifying cancer risk. The City also contends that cancer risk from the air quality impacts of delivery trucks shipping CEMEX's production has not been the subject of prior environmental review under NEPA, and will be exacerbated by the so-called new project acceleration provision. (*Id.*, p. 31-34.) However, as this Court explains below, the City has failed in its attempt to demonstrate that the Project has significantly changed, or that there is significant new information regarding its environmental impacts that triggers re-analysis and recirculation of the FEIR or Final EIS. What the City claims as being "significant new information" is nothing more than a rehash of analysis and information already considered by the County. Thus, there is no need to disapprove the Consent Decree on CEQA or NEPA grounds.

(i) The City's argument that the discovery of the Arroyo Toad and the issuance of the Supplemental Biological Opinion trigger any recirculation under CEQA or NEPA lacks merit

As stated above, the City argues that the provision in the U.S. Fish and Wildlife Service's ("USFWS") Supplemental Biological Opinion ("SBO") for a Habitat Protection Plan ("HPP") allegedly adds five wells to the Project and changes the placement of wells, which, according to the City, radically alters the assumptions upon which the Project was approved. The City argues that the five new wells will significantly impact the Stickleback and Arroyo Toad, and thus, must be honestly and validly analyzed.

The City's arguments that the SBO, which is a document

prepared by the Federal agency with expertise in protecting endangered species and specifically prepared to address and minimize impacts to the Arroyo Toad, now creates significant impacts to the Arroyo Toad, is without merit and lacking of evidence. The City already has an ongoing Endangered Species Act ("ESA") lawsuit against USFWS and BLM pending before U.S. District Judge Robert Takasugi in *City of Santa Clarita v. U.S. Department of the Interior*, No. 02-00697 RMT (PJWx) (C.D. Cal.), challenging both the BO and the SBO, yet no substantive determinations have been made in that case. *See* First Amended Complaint in *City of Santa Clarita v. U.S. Department of the Interior*, No. 02-00697 RMT (PJWx) at ¶¶ 109-122, 195-203, 274-283 (copy attached to Declaration of Edward S. Geldermann in Support of United States' Reply). To the extent the City seeks to challenge the SBO, it is afforded full opportunity to do so in the ongoing *City of Santa Clarita* action.

Moreover, it appears that nothing in the Consent Decree changes the federally approved project with respect to these "new" wells for the Project. The purpose and effects of the additional wells are addressed in the CEQA Findings. (Consent Decree, Exh. E, CEQA Findings, pp. 53-54.) These possible additional well sites were expressly contemplated in the event that monitoring data showed that the existing wells were affecting the Arroyo Toad and the habitat provided by the Santa Clara River. (*See* Casavan Decl., ¶¶ 57-62.) If such effects were seen, wells would be located in different areas to reduce impacts. (*Id.*) In any event, the total amount of water extracted from all of the production wells would not exceed the amounts analyzed in the FEIR and FEIS, and thus, there would not be any increased impacts on the Santa Clara River.

With the level of water extracted remaining the same, this Court finds that the Project remains as previously analyzed

and has not significantly changed in a way relevant to environmental concerns. Since the City's challenge to the Consent Decree based on alleged project changes is without merit, no supplement to the EIS or recirculation of the EIR is required.

(ii) The City's argument that the so-called "project acceleration" condition triggers recirculation of the FEIR and FEIS is groundless

The City argues that approval of the Consent Decree would violate CEQA and NEPA because "Condition 9aa" of the Project Conditions allegedly increases the rate of production of minerals beyond that analyzed in the FEIR or FEIS.[5] The City concludes that Project Condition 9aa allows for a "drastic acceleration" in production, incorrectly labeling it as the "Project Acceleration Condition." However, the City's misreading of this condition simply does not trigger recirculation of the FEIR and FEIS.

As explained by CEMEX, the County, and the United States, Condition 9aa is not acceleration clause, it is merely a production cap. County staff originally proposed to CEMEX that there should be limitation or yearly Project production. During the course of mediation and settlement negotiations,

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[5] Condition 9aa states, in relevant part: "Since actual annual production will vary with market demand and market demand can fluctuate by 20%, *no more than* 5.0 million tons of product per year may be produced and shipped during the life of the permit except in emergency situations as declared by a public agency." (Emphasis added).

the Original Parties reached a compromise by negotiating the current production cap set forth in Project Condition 9aa. Under this condition, CEMEX may not produce and ship more than five (5) million tons in any given year.

Because the project description has not changed and the parties have merely negotiated a production cap, there exists no support for the City's arguments that approval of the Consent Decree with Condition 9aa would violate either CEQA or NEPA.

(iii) The City's argument that a new cancer risk assessment of air quality prepared by the SCAQMD constitutes new information requiring recirculation is meritless

The City also argues that, with or without project acceleration, significant changes have occurred that make reanalysis and recirculation essential. Referring to a letter from the South Coast Air Quality Management District ("SCAQMD"), the City argues that "new methodology" to quantify the cancer risk from delivery trucks was not considered in the existing environmental documentation.[6]

First, the County contends that it has independently analyzed the substance of the SCAQMD comments, and conducted an independent evaluation of the comments made in SCAQMD's letter did not rise to the level of significant new

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[6] The County notes that it was the City's request that SCAQMD re-review the FEIR and FEIS at such a late date, and the SCAQMD letter was not transmitted to the County, but instead to the City.

information requiring recirculation or additional environmental review pursuant to CEQA Guidelines § 15088.5. Further, according to the County, none of the additional mitigation measures suggested by the SCAQMD would reduce any of the impacts already identified and mitigated in the FEIR.

The first comment the SCAQMD makes is that a risk analysis for emissions from delivery trucks was not included in the environmental review of the Project. The County contends that the August 2000 Additional Environmental Information to the Draft Environmental Impact Report ("AEIDEIR") did include analysis of diesel particulate emissions from delivery trucks on the Project sites. The County concedes that it did not include an analysis of delivery trucks on the Soledad Canyon Road because, at the time the FEIR was being prepared, no such risk analysis was required, nor did SCAQMD have any guidance on diesel emissions, or raise the issue in any of its comment letters. Only in response to the City's demands did SCAQMD bring to light that it had recently developed a draft "Health Risk Guidance for Analyzing Cancer Risks From Mobile Source Idling Emissions for CEQA Air Quality Analysis" in December 2002. Nonetheless, the County evaluated the Project in light of the SCAQMD's Guidance document.

Although the primary access route from the Antelope Valley Freeway is the Soledad Canyon Road, the analysis suggested in the Guidance document does not include truck traffic on highways as an applicable category of truck movement. Instead, the document identifies truck traffic on local streets and/or arterial highways as the movements of concern.[7] However, in fulfilling CEQA's spirit of full

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[7] Soledad Canyon Road is a two-lane road that is a non-urban access road and it is classified as a Major Highway in the County Master

disclosure and environmental consideration, the County evaluated the health risk analysis CEMEX completed pursuant to the Guidance document. *Id.* at 37-38. In conclusion, the cancer risk for on-road diesel truck travel for the Project resulted in less than the threshold of significance of 10 in a million. CEQA Findings, p. 38. Thus, as the County contends, the issue of diesel emissions on Soledad Canyon Road does not rise to the level of significant new information and does not trigger recirculation. It appears that the County has carefully and conscientiously examined any comment letters which purport to raise significant new information, and made specific and extensive Findings that no new information has been raised. *See* CEQA Findings, p. 36-38. The City contends that these Findings in response to the SCAQMD concerns were made "behind closed doors" and are invalid. However, as expressed above, these are merely attempts by the City to interfere with the County's right to settle this litigation on lawful and reasonable grounds.

The Federal Government argues the BLM also analyzed impacts to air quality in the EIS, including issues relating to air toxins and cancer causing discharges. According to the Federal Government, prior to issuance of the FEIR, the BLM issued a Supplemental Draft EIS to further address air quality impacts. In addition, a draft conformity determination for the proposed project was provided to the U.S. Environmental Protection Agency ("EPA"), the U.S.D.A. Forest Services, the California Air Resource Board, the AQMD, the Southern California Association of Governments ("SCAG"), and the general public for a 45-day public review. BLM received eleven comments (including one that specifically addressed cancer risk issues). BLM responded to all of these comments and AQMD concurred in BLM's draft conformity

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Highway Plan. *See* CEQA Findings, p. 37.

determination. AR 25422-25474. BLM thereafter issued its final conformity certification. Contrary to the City's assertions, these issues have not been ignored and were analyzed in the EIS. Thus, the AQMD's asserted concerns about the cancer risk do not require further BLM NEPA evaluation or supplemental NEPA review.

This Court concludes that no significant new information exists as the City claims it does, and no change in circumstances relevant to environmental concerns and bearing upon the proposed action or its impacts has occurred. Accordingly, reanalysis or recirculation is not required at this time.

(3) The Project findings do not violate CEQA

The City contends that the Proposed Decree violates CEQA because there must be some sort of new environmental review before the County can repudiate its April 2002 Findings of the Board of Supervisors and Order, Surface Mining Permit Number 91-165(5) ("Board Findings") disapproving the Project, and adopt new Board Findings approving the Project. However, in presenting this argument, the City cites to no statute, regulation or case law in support. The City is unable to demonstrate that the CEQA requires public participation of further environmental review if a public agency reverses itself on a project in light of litigation.

What CEQA does require is that the CEQA Findings be supported by substantial evidence in the record. CEQA Guidelines § 15091(b). This is further substantiated by California case law, which hold that land use findings, such as the Board Findings, must be supported by substantial evidence, but also limits judicial review of the evidence and

calls for deference to the public agency. *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.2d 506, 514-15 (1974). This Court has reviewed the record and finds that the County's new Board Findings are supported by substantial evidence such that it does not violate CEQA compliance and are not sufficient to reject the proposed Consent Decree.

c. The City's Argument That the Consent Decree Would Also Violate the Federal Clean Air Act, the Federal Clean Water Act, and the Federal Land Policy and Management Act are Further Unsupported Attacks by the City to Block This Project

Aside from arguing that the Consent Decree violates CEQA and NEPA, the City also argues that the Decree violates the Federal Clean Air Act, the Federal Clean Water Act, and the Federal Land Policy and Management Act. As the City points out, BLM's ROD requires CEMEX to obtain a Clean Air Act permit from the AQMD. The ROD also requires CEMEX to obtain a stormwater permit and water quality certification from the California Regional Water Quality Control Board – Los Angeles Region and the California State Water Resources Control Board. The City asserts that these local air and water permit requirements require compliance with CEQA.

The City urges the Court to disapprove the Consent Decree because the CEQA process used to obtain information and analysis for purposes of assessing CEMEX's compliance with Federal Clean Air Act and the Federal Clean Water Act is incomplete, and according to the City, pages 43-49 of the

proposed Consent Decree purport to preempt the CEQA process that would be required by those other agencies before they can issue the Clean Air Act and Clean Water Act permits.

The United States argues that there is only one permit affected by the proposed Consent Decree, which is the Country surface mining permit that CEMEX applied for pursuant to SMARA. The United States further argues that nothing in the Decree suggests that the preemption findings of the Decree (i.e. the findings that any further County review of CEMEX's SMARA permit application is preempted) extend to or have any bearing upon other permits that CEMEX needs for the Project. According to the United States, to the extent further CEQA review is preempted by the Consent Decree, that preemption applies only to the CEQA process that is ancillary to the County's review of CEMEX's SMARA permit application.

After review of the Consent Decree, this Court agrees with the United States in that nothing in the Decree purports to affect any CEQA processes that may be ancillary to Federal Clean Air Act or Federal Clean Water Act permits that CEMEX needs to operate the project. Thus, nothing in the Consent Decree restrains the AQMD or the State Water Resources Control Board from conducting such CEQA procedures as may be required by law.

6. The Consent Decree Does Not Impair Substantial Public Interest

The City argues that substantial public interest will be impaired if the Consent Decree is entered. First, the City argues that its first amendment right to petition government will be impaired because the County will take no actions to redress any City grievances regarding the Project. (Opp.,

47:24 to 48:3). However, as explained above, the County retains full discretion and power to enforce mitigation measures and Project Conditions.

Second, the City's claim that the Consent Decree is an unconstitutional "prior restraint" is similarly without merit. (*Id.*, 48:11-14.) The Consent Decree does not operate as a prior restraint, and indeed allows each of the named individuals in the Consent Decree (including County officials and employees) from expressing their own opinions as individuals. *See* Consent Decree, fn. 1. The case law cited by the City in this regard are inapposite as they deal with prior restraint and publication.[8] As it appears to this Court, nothing in the Consent Decree limits any person's right to freedom of speech.

Third, the City's claim that the Consent Decree infringes upon the public's right of review under NEPA and CEQA is not accurate. The City misrepresents CEQA's requirements for public participation when arguing that the public is being left out of the environmental review process of the Project, and somehow, that results in the abridgement of its First Amendment rights to petition government. However, the truth is that the City participated in the throughout the extensive County review of the Project.

As the County explains in their Reply, the City and the public had ample opportunity to review and comment on the

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[8] *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S 539 (1976) (cannot restrain publication by newspaper/broadcase media of murder trial evidence); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (state commission may not publish list of books it believes offend youth morality); *Near v. Minnesota*, 283 U.S. 697 (1931) (newspaper may publish charges of official dereliction of duty by law enforcement officer)

Project. The County published a Notice of Preparation for the EIR on about November 6, 1991. AR 05524. The City responded with a letter outlining the issues it believed the EIR should address. AR 05550-05551. Once the Draft EIR was complete, the County published a Notice of Completion, requesting public comments on the Draft EIR. The City submitted five comment letters to the DEIR. AR 17927-17930; AR 18042-18043. The CEQA comment period on the Draft EIR closed on November 15, 1999. AR 09252-09254. The County subsequently circulated an Additional Environmental Information to the Draft Environmental Impact Report "AEIDEIR" for public review and comment from August 17 to December 26, 2000. Once more, the City participated in the CEQA process by submitting four comment letters to the AEIDEIR. *Id.* The County held approximately nineteen (19) continued public hearing sessions, including at least ten (10) public hearing sessions with public comments and/or testimony, and two (2) public circulations for comments on revised versions of FEIR. The City participated in at least nine (9) public hearing sessions on the Project and the EIR. AR 18129; AR 06661; AR 06763; AR 08611-08614; AR 09259-09261; AR 10349-10358; AR 11117-11306; AR 17515-17641; AR 17755-17775; AR 19322-19328.

Even after the close of the comment period, the County requested that CEMEX meet with the City and other public groups to attempt to address all community concerns over the Project. AR 17510-17512; AR 19515-19516. As a result of that meeting, the City submitted further materials for the County's consideration of the Project. AR 19569-16000. Accordingly, the County at all times encouraged and facilitated public review of the Project and consulted with the City in the process. Thus, substantial public interest will not impaired by the granting of the Consent Decree.

III. Conclusion

This Court concludes that this Consent Decree not only results in a much more environmentally friendly Project than originally proposed or that would have resulted from completion of the litigation, but it also resolves this complex and contentious litigation in a lawful and reasonable manner. In light of the foregoing, this Court hereby **grants** the CEMEX's Request for Judicial Notice and **grants** CEMEX's Motion for Entry of Consent Decree as proposed and lodged with the Court.

IT IS SO ORDERED.

DATED: 5/3/04

DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States District Court